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Wisconsin.

WISCONSIN REPORTS

107

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

APRIL 27 — OCTOBER 30, 1900.

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, - EMMETT R. HICKS.

Clerk, - - - CLARENCE KELLOGG.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 103.

Page 550, line 24. For 102 Wis. read 101 Wis.

TABLE

OF

CASES REPORTED.

Adams v. Savery House Hotel Co 109

Wrongful attachment: Liability of creditor: Appeal: Evidence: Assertions of counsel.

Adkins v. Loucks 587

Attachment, when lies: Liability of heirs for debts of ancestor: Appeal: Order, when reviewable: Judgments: Fraudulent conveyances: Parties: Joinder of causes of action: Foreign guardian: Sale of ward's realty in Wisconsin: Limitation of actions: Nonresidents.

American Surety Co., Hill v 19

Ames v. Lamont 531

Real-estate agents: Contracts: Performance: Breach: Consideration.

Attorney General, State ex rel., v. Portage City Water Co. 441

Babcock v. Chicago & Northwestern R. Co 280

Railroads: Eminent domain: Recovery for land taken without condemnation: Estoppel: Petition: Description of the premises: Jurisdiction: Necessity of the taking.

Baier v. Hosmer 380

Highways: Lands excluded from access: Filing order: Payment of advantages assessed: Payment to town chairman: Mandatory statute.

Beach, Kohl v 409

Beaudry, Kendall v 180

Bell, Hollister v 198

Bouck, Stanley v *225*
Boycott, State ex rel., v. Mayor, etc., of La Crosse *654*
Brauchle v. Nothhelfer *457*

Forcible entry and detainer: Jurisdiction: Notice to quit: Proof of service: Landlord and tenant: Lease: Construction: Court and jury: Prejudicial error: Pleading: Counterclaim.

Carey, Shaft v *273*
Carpenter v. McCord Lumber Co *611*

Logs and lumber: Liens: Building logging railroad: Pleading: Alleging corporate existence.

Carpenter v. Town of Rolling *559*

Highways: Pleadings: Negative pregnant: Death: Traveled track: Court and jury: Proximate cause: Verdict: Notice, by whom signed, when sufficient: Widow: Pecuniary loss: Evidence: Instructions to jury: Intoxication: Contributory negligence.

Carter, Provident Loan & Building Asso. v *383*
Case Plow Works v. Niles & Scott Co *9*
Cavour, Town of, Mueller v *599*
Cernahan v. Chrisler *645*

Conversion: Return of property pending suit: Damages: Mitigation: Tender: Costs.

Chicago & Northwestern R. Co., Babcock v *280*
Chicago & Northwestern R. Co., Hulien v *122*
Chicago & N. W. R. Co. v. Oshkosh, A. & B. W. R. Co. *192*

Railroads: Incorporation to carry passengers only: Eminent domain: Condemnation of land: Construction of statutes: "Or" construed "and."

Chicago & Northwestern R. Co., Smith v *35*
Chittenden, State ex rel. Rice v *354*
Chrisler, Cernahan v *645*
Chronicle Publishing Co., Dabold v *357*
Collins v. City of Janesville *436*

Municipal corporations: Personal injuries: Evidence: Cross-examination: Defect in sidewalk: Notice: Knowledge of existence: Degree of care: Instructions to jury: Ordinary care: Proximate cause: Excessive damages.

Collins, Sullivan v. 291
Commercial Nat. Bank of Appleton v. Smith 574
Bills and notes: Indorsement: Guaranty: Statute of frauds: New and independent consideration: Incidental benefits.

Cotzhausen, Huebschmann v. 64
Cotzhausen v. H. W. Johns Mfg. Co 59
Garnishment: Dismissal of principal action: Costs: Appeal from clerk's taxation.

Cuddy v. Foreman 519
Vendor and purchaser of land: Oral agreement: Statute of frauds: Recovery of earnest money: Evidence: Change of possession: Court and jury: Refusal of wife to sign mortgage: Failure of title: Damages.

Curtis, State ex rel., v. Town Board of Geneva 1

Dabold v. Chronicle Publishing Co 357
Libel and slander: Adulteration of butter: Violation of criminal statute: Moral turpitude: Pleading: Responsibility for libel.

Dapper v. City of Milwaukee 88
Municipal corporations: Injuries from defective sidewalk: Ice and snow: Proximate cause.

Davis & Starr Lumber Co., State ex rel., v. Pors 420
Desmond v. McNamara 126
Deeds: Covenants against incumbrances: Parol evidence: Acceptance: Assumption of debt: Execution of renewal mortgage by grantee.

Dorer, Hood v. 149
Dorothy v. Richmond 652
Appeals from justice's court: Trials *de novo:* Review of orders of justice of the peace.

Ebert v. Langlade County 569
Claim for relief of transient poor: Reimbursement of town by county: Construction of statutes: Equity: Suit by taxpayer.

Egelhoff, McAuliffe v. 132

Erickson v. McGeehan Construction Co 49

(1) Reference: Setting aside findings. (2) Money had and received.

Estate of Leiby, Richter v 404
Estate of Warner, Jordan v 539
Evans v. Rector 286

Garnishment: Filing of pleadings: Trustees: Liability as garnishees: Contingent interest: "*In custodia legis.*"

Fitzgerald v. Walsh 92

Contracts: Mechanics' liens: Architects: Plans and specifications: Acceptance: Commencement of work: When lien attaches.

Ford v. Schliessman 479

Trespass: Instructions to jury: Evidence: Possession of dwelling by wife in husband's absence: Damages.

Foreman, Cuddy v 519
French, McGinn v 54
French Lumbering Co. v. Theriault 627

Debtor and creditor: Fraudulent conveyances: "Void" in statute: Lien of judgment docketed against fraudulent vendor: Priority: Equity: Remedies: Deed of insane person, when voidable.

Galesville, Village of, v. Parker 363

Highways: Encroachments: Plats: Surveys: Ancient fences.

Gallagher, McEvoy v 331
Garden City Banking & Trust Co., Segnitz v 171
Gardner, Ordway v 74
Geneva, Town Board of, State ex rel. Curtis v 1

Hamilton, Haring v 112
Haring v. Hamilton 112

Pledge: Voluntary assignment: Fraudulent conveyances: Intent: Corporations: Misconduct of officers: Liability of pledgee of stock.

Helmke v. Thilmany 216

Master and servant: Personal injury: Minors: Unguarded machinery: Assumption of risk: Court and jury.

Higbee, La Crosse City R. Co. v 389

Hill v. American Surety Co. 19

Voluntary assignments: Negligence of assignee: Degree of care: Failure to insure: Burden of proof: Evidence: Opinion as to future conduct: Breach of assignee's bond: Remedies: Abatement of actions: Waiver: Appeal: Bill of exceptions: Action at law: Directions for judgment.

Hilz, Kammermeyer v. 101

Hochrein, Metzger v. 267

Holland, In re Town of 178

Hollister v. Bell 198

Practice: Action at law: Equitable relief: Married women: Promissory notes: Payment of husband's debt.

Hood v. Dorer 149

Wills: Construction: Equitable conversion: Charitable trusts: Indefiniteness in beneficiaries: Judgments: *Res adjudicata.*

Hosmer, Baier v. 380

Hudson v. Northern Pacific R. Co. 620

Negligence: Court and jury: Pleading: Guardian *ad litem:* Instructions to jury: Proximate cause.

Huebschmann v. Cotzhausen 64

Ejectment: *Res adjudicata:* Betterments: Parties: Writ of error: Variance from record: Immaterial error.

Hulien v. Chicago & Northwestern R. Co. 122

Railroads: Injury causing death of engineer: Repairing engine: Failure to give warning: Collision: Contributory negligence.

H. W. Johns Mfg. Co., Cotzhausen v 59

Icks, McCall Co. v 232

Independent Order of Foresters, McGowan v 462

In re Town of Holland 178

Supreme court: Original jurisdiction: Villages: Validity of incorporation.

Jacobs, Nelson v *531*
Janesville, City of, Collins v *436*
J. I. Case Plow Works v. Niles & Scott Co *9*

Sale of chattels: Warranty: Breach: Retention of property by purchaser: Absolute worthlessness: Evidence: Measure of damages: Interest

Johns Mfg. Co., Cotzhausen v *59*
Johnson v. Johnson *186*

Divorce: Cruel and inhuman treatment: Appeal: Costs against wife.

Johnston v. Northwestern Live Stock Ins. Co *337*

(1, 2) Appeal: Undertaking: Corporate suretyship: Justification of sureties: Certificate of commissioner of insurance: Perfecting undertaking on leave of supreme court. (3-8) Insurance of live stock: Condition of policy as to notice: Forfeiture: Promissory warranty: Breach: Mortgage: Amount due: Court and jury: *Res adjudicata:* Representation or warranty.

Jordan v. Estate of Warner *539*

Estates of decedents: Accounting: Compulsory reference: Mortgages: Defeasance: Equity: Evidence: Legal or equitable action: Subject of the action: Election of remedy: Appeal: Immaterial and prejudicial error: Exceptions: Mortgagor and mortgagee: Tax titles: Usury: Tender of principal: Pleading.

Jorgenson, McAuliffe v *132*

Kammermeyer v. Hilz *101*

Action, at law or in equity? Settlement for seduction of daughter: Rights of father and daughter in money paid: Death of child: Parol evidence: Receipts.

Kendall v. Beaudry *180*

Insolvency: Husband and wife: Continuation of business by wife: Rights of husband's creditors.

Kohl v. Beach *409*

Principal and agent: Delegation of agent's authority: Subagents: Collections: Implied authority: Mortgages.

La Crosse City R. Co. v. Higbee *389*

Electric street railways: Additional burden to fee: Streets: Rights of abutting owners: Trolley-wire pole: Right of city to authorize use of street for such poles.

La Crosse, Mayor, etc., of, State ex rel. Boycott v. *654*

Lamont, Ames v *531*

Langlade County, Ebert v *569*

Leiby, Estate of, Richter v *404*

Lemmin v. Lorfeld *264*

Parent and child: Custody of minor children.

Libby, McNeil & Libby, Welsher v *47*

Lindekugel, McFarland v *474*

Linden Land Co. v. Milwaukee Electric R. & L. Co *493*

(1) Appeal: Intermediate orders, when reviewed. (2) Denial of leave to discontinue action: Jurisdiction. (3–14) Taxpayer's action: Street railroads: Franchises: Discretion of common council: Parties: Pleadings: Surplusage: Injunction: Motion to vacate: Abutters: Compensation: Constitutional law: Statutes: Reasonableness of extension of franchise: Review of ordinance granting franchises at suit of private parties.

Lorfeld, Lemmin v *264*

Loucks, Adkins v *587*

Marinette Lumber Co., Sladky v *250*

Mayor, etc., of La Crosse, State ex rel. Boycott v *654*

McAuliffe v. Jorgenson and others *132*

Mechanics' liens: Wells: Use of machine: Partnership: Evidence: Judgment.

McCall Co. v. Icks *232*

Contracts: Sales: Offer: Mutuality: Consideration: Uncertainty: Measure of damages: Evidence: Interest.

McCann, State ex rel. Schermerhorn v *348*

McCord Lumber Co., Carpenter v *611*

McEvoy v. Gallagher *331*

Waters: Diversion: Natural watercourse: Contempt: Violation of injunction: Findings: Appealable order.

McFarland v. Lindekugel *474*

Streets: Easements: Plats: Estoppel: Injunction.

McGeehan Construction Co., Erickson v *49*
McGinn v. French *54*

Appeal: Review of evidence: Agency: Landlord and tenant: Agreement to repair: Negligence: Contributory negligence: Verdict.

McGowan v. Supreme Court of I. O. F. *462*

Mutual benefit insurance: Materiality of answers in application: Warranty: Breach: Intentional concealment.

McMurdo, Missinskie v *578*
McNamara, Desmond v *126*
Menasha, City of, Rhyner v *201*
Metzger v. Hochrein *267*

Nuisance: Unsightly fence: Obstruction to view: Pleading.

Michelson v. Pierce *85*

Corporations: Stockholders: Winding-up action: Debtor and creditor: Officer: Misfeasance and nonfeasance: Gratuitous service.

Milwaukee, City of, Dapper v. *88*
Milwaukee, City of, Watson v. *328*
Milwaukee County, St. Æmilianus Orphan Asylum v. .. *80*
Milwaukee Electric R. & L. Co., Linden Land Co. v. .. *493*
Missinskie v. McMurdo *578*

Debtor and creditor: Fraudulent conveyances: Sale of chattels: Consideration: Change of possession: Instructions to jury: Burden of proof: Special verdict.

Moody, Roberts v *245*
Morgan v. Mueller *241*

Partition: Possession, when adverse: Abatement of action: Practice: Equity.

Mueller, Morgan v *241*
Mueller v. Town of Cavour *599*

Taxation: Towns: Population: Statutes: Construction: Amendments: Limit on taxation: Town orders: Interest.

Nelson v. Jacobs *531*
Nelson v. Stephens *136*

Option or land contract? Forfeiture: Failure to perform conditions precedent: Waiver: Tender: Sureties: Liability on undertaking.

New Home Sewing Machine Co. v. Simon 368

Appeal: New trial: *Res adjudicata:* Guaranty: Conditional delivery: Waiver: Instructions to jury: Perverse verdict: Refusal to set aside: Abuse of discretion.

Nickel, Pagal v 471
Niles & Scott Co., J. I. Case Plow Works v 9
Northern Pacific R. Co., Hudson v 620
Northwestern Live Stock Ins. Co., Johnston v 337
Norvell, Swan v 625
Nothhelfer, Brauchle v 457

Ordway v. Gardner 74

Wills: Construction: Trusts and trustees: Trust, when closed.

Oshkosh, A. & B. W. R. Co., Chicago & N. W. R. Co. v. 192

Pagal v. Nickel 471

Bills and notes: Conditions: Leases: Contemporaneous agreements: "On or before" in promissory note.

Parker, Village of Galesville v 363
Pieper, Spence v 453
Pierce, Michelson v 85
Pors, State ex rel. Davis & Starr Lumber Co. v 420
Portage City Water Co., State ex rel. Att'y Gen. v 441
Provident Loan & Building Asso. v. Carter 383

Building and loan associations: Mortgages: Application of payments: *Ultra vires:* Estoppel: Subsequent incumbrancer: Notice: Recording act: Marshaling funds: Laches: Default in payments: Premature commencement of action.

Putnam, Smith v 155

Rector, Evans v 286
Renne v. United States Leather Co. 305

Master and servant: Personal injuries: Evidence: Negligence: Proximate cause: Instructions to jury: Assumption of risk: "Precise danger:" Verdict: Contributory negligence: Excessive damages.

Rhyner v. City of Menasha..... *201*

Special verdict: Instructions to jury: Municipal corporations: Defective streets: Personal injuries: Negligence: "Ordinary care:" Intoxication: Contributory negligence: Notice: Measure of damages.

Rice, State ex rel., v. Chittenden..... *354*

Richmond, Dorothy v..... *652*

Richter v. Estate of Leiby..... *404*

Disqualification of county judge: "Guardian of any ward": Guardian *ad litem:* Construction of statutes: Second appeal: Waiver: Embezzlement by trustee: *Devastavit:* Action on bond, when not premature: Sureties.

Roberts v. Moody..... *245*

Fraud: Equity: Trust funds: Remedy at law: Judgments: *Res adjudicata.*

Roberts v. Roberts..... *213*

Wills: Fraud by attorney in drawing: Costs.

Roberts v. Von Briesen..... *486*

Surface water: Drains: Easements: Prescription.

Roepke, Van Doren v..... *535*

Rolling, Town of, Carpenter v..... *559*

St. Æmilianus Orphan Asylum v. Milwaukee County.. *80*

County board: Quorum: "Majority vote:" Statutes construed.

Savery House Hotel Co., Adams v..... *109*

Sawell, State v..... *300*

Schermerhorn, State ex rel., v. McCann..... *348*

Schliessman, Ford v..... *479*

Scottish Union & Nat. Ins. Co., Wicks Bros. v..... *606*

Segnitz v. Garden City Banking & Trust Co..... *171*

Voluntary assignments: Bankruptcy: Title to property in another state: Filing of claim by foreign creditor: Estoppel: Corporation a "person:" Construction of statutes.

Shaft v. Carey..... *273*

Landlord and tenant: Leaseholds: Appurtenances of ingress and egress: Restrictions in lease: Injunctions.

Simon, New Home Sewing Machine Co. v *368*

Sladky v. Marinette Lumber Co *250*

Special verdict: Instructions to jury: Negligence: Master and servant: Obvious defects: Failure to warn: Assumption of risk: Contributory negligence.

Smith v. Chicago & Northwestern R. Co *35*

Railroads: Personal injury: Court and jury: Special verdict: Splitting up damages: Appeal: New trial.

Smith, Commercial Nat. Bank v *574*

Smith v. Putnam *155*

Logs and timber: Partnership agreement: Suit at law: Recovery of profits: Waiver: Parol contract for dealings in land: Statute of frauds: Executed agreement: Contribution to partnership: Joinder of causes of action: Interest: Appeal: Record.

Spence v. Pieper *453*

Mortgages: Agency to receive payment: Possession of securities: Negligence.

Stanley v. Bouck *225*

Setoffs: Assignment of claim to attorney: Priority: Notice: Commencement of action: Estoppel *in pais*.

State v. Sawell *300*

Courts: Jurisdiction: Statutes: Repeal: Revival.

State ex rel. Att'y Gen. v. Portage City Water Co *441*

Franchise: Grant by common council: Corporate franchise: Corporations: Forfeiture of charters: Statutes: Circuit courts: Jurisdiction: *Quo warranto*.

State ex rel. Boycott v. Mayor, etc., of La Crosse *654*

Municipal corporations: Amendment of charter: Adoption of portions of general city charter law.

State ex rel. Curtis v. Town Board of Geneva *1*

Highways: Establishment: Appeal from town board by non-resident freeholder: Promises of aid in construction.

State ex rel. Davis & Starr Lumber Co. v. Pors *420*

Taxation: Assessment of property omitted from previous years: Statutes: Construction: Board of review.

State ex rel. Rice v. Chittenden *354*

Mandamus: **Return: Demurrer: Costs: Practice.**

State ex rel. Schermerhorn v. McCann *348*

Mandamus: **Disputed highways: Obstructions: Removal by supervisors.**

Stephens, Nelson v *136*

Sullivan v. Collins *291*

Pleading: Amendment on trial: Statute of limitations: Abuse of discretion: Evidence: Cross-examination: Trials: Insinuations by counsel against character of witness: Instructions to jury: Motive in bringing action.

Supreme Court I. O. F., McGowan v *462*

Swan v. Norvell *625*

Special administrator: "Personal representative:" Capacity to sue for death of his decedent.

Theriault, French Lumbering Co. v *627*

Thilmany, Helmke v *216*

Town Board of Geneva, State ex rel. Curtis v *1*

United States Leather Co., Renne v *305*

Van Doren v. Roepke *535*

Statute of frauds: Contract for sale of lands: Memorandum: Requisites.

Von Briesen, Roberts v *486*

Walsh, Fitzgerald v *92*

Warner, Estate of, Jordan v *539*

Watson v. City of Milwaukee *328*

Appeal: Bill of exceptions: Printed case: Questions reviewed.

Welsher v. Libby, McNeil & Libby *47*

Offsetting judgments of different courts: Conclusiveness of judgment: Pendency of another action.

Wicks Brothers v. Scottish Union & National Ins. Co. *606*

Fire insurance: Surrender and cancellation of policy: Agency.

TABLE

OF

CASES CITED BY THE COURT.

Ackerman v. Cross, 40 Barb. 465 - - - - - - 174
Adams v. Beloit, 105 W. 363 - 658, 659, 663, 664, 670
——— v. C. & N. W. R. Co. 89 W. 645 - - - - - - 320
——— v. Oshkosh, 71 W. 49 - 211
Ahlhauser v. Doud, 74 W. 400 636
Aldrich v. Bailey, 132 N. Y. 85 640
Aldridge v. Muirhead, 101 U. S. 397 - - - - - - 184
Alexander v. Oneida Co. 76 W. 56 - - - - - - - 605
Allen v. Berryhill, 27 Iowa, 534 642
Allis v. Billings, 6 Met. 415 - 642
Althouse v. Jamestown, 91 W. 46 - - - - - - - - 563
Anders v. Supreme Lodge, 51 N. J. Law, 175 - - - 469
Annas v. M. & N. R. Co. 67 W. 63 - - - - - - - - 377
Ansorge v. Barth, 88 W. 553 - 184
Armour v. Transatlantic F. Ins. Co. 90 N. Y. 450 - - 470
Ashland v. Wheeler, 88 W. 607 445, 668
Askew v. La Cygne Exch. Bank, 83 Mo. 366 - - - 174
Atkinson v. City Council of Newton, 169 Mass. 242 - 8
Att'y Gen. v. Eau Claire, 37 W. 400 - - - - - - 179
——— v. Railroad Cos. 35 W. 425 - - - - 179, 447, 514
——— v. S. & St. C. R. Co. 93 W. 604 - - - - - - 448
Austin v. Allen, 6 W. 142 - 5
Avery v. Johann, 27 W. 246 - 586
——— v. Judd, 21 W. 262 - 556
Backus v. Ames, 81 N. W. 766 27
Bacon v. Pomeroy, 118 Mich. 145 - - - - - - 415
Badger v. Janesville C. Mills, 95 W. 599 - - - - - 326
Ball v. Mannin, 1 Dow & C. 380 - - - - - - 638
Ballston Spa Bank v. Marine Bank, 16 W. 120 - - - 527
Baltimore v. Frick, 82 Md. 77 477
Baltimore & O. R. Co. v. O'Donnell, 21 L. R. A. 117 - - 648
Bannister v. Phelps, 81 W. 256 120
Barnes v. Beloit, 19 W. 93 - 508
——— v. Burns, 81 W. 235 - - 469
——— v. Racine, 4 W. 454 - - 508
Barr v. Church, 82 W. 382 - 120
Bartel v. Brown, 104 W. 493 414, 456
Barth v. Backus, 140 N. Y. 230 175
Bartlett v. Bangor, 67 Me. 460 477
Bashor v. Cady, 2 Ind. 582 - 145
Basshor v. B. & O. R. Co. 65 Md. 99 - - - 135, 616, 617
Bates v. Babcock, 16 L. R. A. 745 - - - - - - - 162
Batterson v. C. & G. T. R. Co. 53 Mich. 125 - - - - - 312
Baumgart v. Modern Woodmen, 85 W. 546 - - - 469
Baxter v. C. & N. W. R. Co. 104 W. 307 - - - - 324, 582
Beach v. Hancock, 27 N. H. 223 434
Beardsley v. Davis, 52 Barb. 159 27
Beaton v. Milwaukee, 97 W. 416 - - - - - - 91
Becker v. Howard, 75 W. 415 551
——— v. Knudson, 86 W. 14 130, 526
Beckman v. Beckman, 86 W. 655 - - - - 130, 526

Beire v. Patton, 17 La. 589 - 174
Bell v. Shafer, 58 W. 223 - 582
Bessex v. C. & N. W. R. Co. 45 W. 477 - - - - - - 312
Bethune v. Bethune (1891), Prob. Div. 205 - - - 191
Bibb v. Allen, 149 U. S. 481 - 163
Bigelow v. Danielson, 102 W. 470 - - - - - 257, 582
——— v. Washburn, 98 W. 553 605
Bigelow Co. v. Heintze, 53 N. J. Law, 69 - - - - 650, 651
Binder v. McDonald, 106 W. 332 - - - - - - 175
Bingham v. Ins. Co. 74 W. 498 610
Bird v. Morrison, 12 W. 138 - 162
Birdsall v. Carter, 11 Neb. 143 15
Birmingham T. Co. v. B. R. & E. Co. 119 Ala. 137 - - 402
Bissell v. N. Y. C. R. Co. 23 N. Y. 62 - - - - - 477
Black v. Zacharie, 3 How. 483 174
Black River Imp. Co. v. Holway, 87 W. 584 - - - 514
Blake v. County Comm'rs, 114 Mass. 583 - - - - - 7
——— v. Graves, 18 Iowa, 312 524
Bleiler v. Moore, 88 W. 438 - 585
——— v. ———, 94 W. 385 120, 121, 585
Blum v. Van Vechten, 92 W. 378 - - - - - - 290
Blumer v. Phœnix Ins. Co. 45 W. 622 - - - - - - 469
——— v. ———, 48 W. 535 - 469
Board of Education v. Spencer, 52 Kan. 574 - - - 352
Boelter v. Ross L. Co. 103 W. 324 - - - - - - 208
Bohn Mfg. Co. v. Lewis, 45 Minn. 164 - - - - - 145
Boland v. Benson, 50 W. 225 - 33
Boody v. R. & B. R. Co. 24 Vt. 665 - - - - - 95, 96
Bordeaux v. Greene, 22 Mont. 254 - - - - - 270, 271
Bork v. Martin, 132 N. Y. 280 - 163
Borst v. Simpson, 90 Ala. 373 - 143
Bostwick v. Hess, 80 Ill. 138 - 145
Bosworth v. Tallman, 66 W. 533 - - - - - - - 48
Bowden v. Schatzell, 1 Bailey, Eq. 360 - - - - - - 290
Bowe v. Wilkins, 105 N. Y. 322 111
Bowen v. Bell, 20 Johns. 338 - 163
Boyer v. Berryman, 123 Ind. 451 - - - - - - 642
Boyle v. N. W. M. R. Asso. 95 W. 312 - - - - - - 469
Bradford v. Underwood L. Co. 80 W. 50 - - - 614
Brand v. James, 67 W. 541 - 108
Brandeis v. Neustadtl, 13 W. 142 - - - - - - 163
Braunsdorf v. Fellner, 76 W. 1 34
Brauser v. New England F. Ins. Co. 21 W. 506 - - 618
Breed v. Ketchum, 51 W. 164 502
Briggs v. Lewiston & A. H. R. Co. 79 Me. 363 - - 395, 402
Brigham v. Fayerwether, 144 Mass. 48 - - - - - 641
Brokaw v. Comm'rs, 130 Ill. 482 - - - - - - 352
Bromley v. Lathrop, 105 Mich. 492 - - - - - - 417
Brooke v. Garrod, 3 Kay & J. 608 - - - - - - 145
Brooks v. Lester, 36 Md. 65 - 99
Brown v. Doyle, 69 Minn. 543 18
——— v. Miles, 61 Hun, 453 - 639
——— v. Pendergast, 7 Allen, 427 - - - - - - 425
Buchner v. C., M. & N. W. R. Co. 56 W. 403 - - 282, 283
Buel v. Buel, 76 W. 413 - - 461
Buell v. Buckingham, 16 Iowa, 284 - - - - - - 82
Buford v. Gould, 35 Ala. 265 - 18
Bulkley v. Eckert, 3 Pa. St. 368 290
Burke v. Allen, 29 N. H. 106 - 643
Burnham v. Kidwell, 113 Ill. 425 - - - - - - 642

Cairncross v. Pewaukee, 86 W. 181 - - - - - - 440
Campbell v. Colorado C. & I. Co. 9 Colo. 60 - - - 174
Carey v. Dyer, 97 W. 554 - 120
——— v. Liverpool & L. & G. Ins. Co. 92 W. 538 - - 118
Carmody v. Mulrooney, 87 W. 552 - - - - - - 492
Carrier v. Sears, 4 Allen, 336 - 641
Case v. Hoffman, 100 W. 336 - 73
Case P. Works v. Niles & Scott Co. 107 W. 9 - - - - 241
Case T. M. Co. v. Miracle, 54 W. 295 - - - - - - 290
Casey v. C., St. P., M. & O. R. Co. 90 W. 113 - - - 224, 311
Castro v. Geil, 110 Cal. 292 - 642
Chafee v. Fourth Nat. Bank, 71 Me. 514 - - - - 174

Chamberlain v. Oshkosh, 84 W. 289 - - - - - - 91
Chenowith v. Dickinson, 8 B. Mon. 156 - - - - - 27
Chicago. B. & Q. R. Co. v. West Chicago St. R. Co. 156 Ill. 255 402
Chicago, M. & St. P. R. Co. v. Richardson, 86 W. 154 - 285
Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co. 95 W. 561 - - - 393, 394, 512
Chicago, St. L. & W. R. Co. v. Gates, 120 Ill. 86 - - - 283
Chippewa Valley & S. R. Co. v. C., St. P., M. & O. R. Co. 75 W. 253 - - - - 178, 451
Chopin v. Badger P. Co. 83 W. 192 - - - 223, 224, 319
Church Asso. v. Walton, 114 Mich. 677 - - - 415, 418
Churchill v. Welsh, 47 W. 39 649
City R. Co. v. Citizens' St. R. Co. 166 U. S. 557 - - - 515
Claflin Co. v. Grashorn, 99 W. 356 - - - - - 120, 121
Clapp v. Massachusetts B. Asso. 146 Mass. 519 - - - 469
——— v. Webb, 52 W. 638 - 577
Clark v. Woodruff, 83 N. Y. 518 111
Clarke v. McAuliffe, 81 W. 104 162
Clauson v. C. & N. W. R. Co. 106 W. 308 - - - - - 490
Clinton B. & I. Works v. First Nat. Bank, 103 W. 117 - 161
C. N. Nelson L. Co. v. Loraine, 24 Fed. 456 - - - - - 603
Coe v. Lawrence, 1 El. & Bl. 516 - - - - - - 433
Coflin v. Kelling, 83 Ky. 649 - 174
Cole, Estate of, 102 W. 1 - 504
Cole v. Getzinger, 96 W. 559 - 249
Colf v. C., St. P., M. & O. R. Co. 87 W. 273 - 312, 313, 317
Collamer v. Foster, 26 Vt. 754 167
Collins v. Janesville. 99 W. 464 438
——— v. Lowry, 78 W. 329 648, 650
Commercial Bank v. Firemen's Ins. Co. 87 W. 297 - - 29
——— v. Red River V. Nat. Bank, 79 N. W. 859 - - 27
Comm'rs of Canal Fund v. Perry, 5 Ohio, 58 - - - 8
Comm'rs of Highways v. People *ex rel.* Bonker, 66 Ill. 339 352
——— v. Quinn, 136 Ill. 604 - 5
Comm. v. Cambridge, 7 Mass. 165 - - - - - - 7
——— v. Sawin, 2 Pick. 547 - 7
Connor v. Renneker, 25 S. C. 514 - - - - - - 148
Conrad v. Schwamb, 53 W. 372 - - - - - - 530
Cook v. Milwaukee, 24 W. 270 91
——— v. ———, 27 W. 191 - 91
——— v. Soule, 56 N. Y. 420 - 58
——— v. Van Horn, 81 W. 291 174
Cooper v. Waterloo, 98 W. 424 91
Copeland v. Packard, 16 Pick. 217 - - - - - - 7
Copp v. German Am. Ins. Co. 51 W. 637 - - - - - 469
Corcoran v. Milwaukee G. L. Co. 81 W. 191 - - - 58
Cornell, *In re*, 110 N. Y. 351 - 24
Cornell v. Radway, 22 W. 260 633–635
Courtney v. McGavock, 23 W. 619 - - - - - 230–232
Covington v. East St. Louis, 78 Ill. 548 - - - - - - 664
Craig v. First Presbyterian Church, 88 Pa. St. 42 - - 84
Craven v. Smith, 89 W. 126 - 224
Crawford v. Scovell, 94 Pa. St. 48 - - - - - - - 642
Cribb v. Hibbard, S., B. & Co. 77 W. 199 - - - - - 118
Crichton v. Crichton, 73 W. 59 190
Cross v. Milwaukee, 19 W. 509 425–427
Crouse v. C. & N. W. R. Co. 104 W. 473 - - - - - 324
Culbertson v. Coleman, 47 W. 200 - - - - - - - 6
Cumberland Co. Sup'rs v. Webster, 53 Ill. 141 - - 83
Cumberland T. & T. Co. v. U. E. R. Co. 93 Tenn. 492 402, 403
Cummings v. Hurd, 49 Mo. App. 139 - - - - - 415
——— v. Town of Lake R. Co. 86 W. 382 - - - - - 145
Cunningham v. Eagan, 102 W. 272 - - - - - - - 120
Curry v. C. & N. W. R. Co. 43 W. 665 - - - - - - 222
Curtis v. C. & N. W. R. Co. 95 W. 460 - - - - - - 312

Dahlke v. Illinois S. Co. 100 W. 431 - - - - - - 261
Davis v. Farmington, 42 W. 431 - - - - - - 257
Davis L. Co. v. Hartford F. Ins. Co. 95 W. 226 - - 609
Dayton v. Walsh, 47 W. 113 - 184

Dean, *In re*, 86 N. Y. 398 - 24
Dean v. Ann Arbor St. R. Co. 93 Mich. 330 - - - - 402
Deery v. McClintock, 31 W. 195 - - - - - 243, 244
Deisenrieter v. Kraus-M. M. Co. 97 W. 279 - - 260, 624
De Pere v. Hibbard, 104 W. 666 - - - - - - 91
Detroit City R. Co. v. Mills, 85 Mich. 634 - - 395, 396, 399
Dexter v. Hall, 15 Wall. 9 642, 643
——— v. Morrow, 76 Minn. 413 415
Dilworth v. Curts, 139 Ill. 508 409
Dobson v. Hohenadel, 148 Pa. St. 367 - - - - - - 477
Dodge v. Hopkins, 14 W. 630 - 147
Donnelly v. Eastes, 94 W. 390 145, 148
Donohoo v. Murray, 62 W. 100 477
Donovan v. C. & N. W. R. Co. 93 W. 373 - - - - - 324
Dorsey v. Phillips & C. C. Co. 42 W. 597 - - 312, 317-319.
Doty v. Strong, 1 Pin. 165 - 73
Dowling v. Lancashire Ins. Co. 92 W. 63 - - 659, 663, 664
Drew v. Ferson, 22 W. 651 - 167
Driver v. W. U. R. Co. 32 W. 569 - - - - - - 283
Druse v. Horter, 57 W. 644 - 550
Dudley v. Cilley, 5 N. H. 558 - 7
Dugal v. Chippewa Falls, 101 W. 533 - - - - - 261, 582
Dugan v. C., St. P., M. & O. R. Co. 85 W. 614 - - - 222
Duggan v. Washougal L. & L. Co. 10 Wash. 84 - - - 616
Duncan v. W. U. Tel. Co. 87 W. 173 - - - - - - 25
Dwight v. Germania L. Ins. Co. 103 N. Y. 341 - - - 470
Dyer v. Gibson, 16 W. 557 - 577

Eastman v. Schettler, 13 W. 632, 325 - - - - - - 633
Eaton v. Eaton, 37 N. J. Law, 108 - - - - - - 642
Eberhardt v. Sanger, 51 W. 74 257
Edwards v. Roepke, 74 W. 571 290
Egan v. Sawyer & A. L. Co. 94 W. 137 - - - - - - 319
Ellis v. N. P. R. Co. 80 W. 459 73
Elston v. Jasper, 45 Tex. 409 - 642
Emerson-Talcott Co. v. Knapp, 90 W. 35 - - - - - 200
Enos v. Sanger, 96 W. 150 - 129
Erdall v. Atwood, 79 W. 7 120, 121
Erdman v. Illinois S. Co. 95 W. 6 - - - - - - 261
Escott v. White, 10 Bush, 169 95
Esslinger v. Huebner, 22 W. 632 - - - - - - 98
Evans v. Laughton, 69 W. 138 636
Ewald v. C. & N. W. R. Co. 70 W. 420 - - - - - - 221

Fadness v. Braunborg, 73 W. 279 - - - - - 178, 451
Farley v. Parker, 6 Oreg. 105 639, 643
Farr v. State Bank, 87 W. 223 650
Feibelman v. Packard, 108 U. S. 14 - - - - - - 73
Finney v. Ackerman, 21 W. 268 - - - - - - 427
Fire Department v. Tuttle, 50 W. 552 - - - - - - 73
First Nat. Bank v. Chafee, 98 W. 42 - - - - - - 278
——— v. Damm, 63 W. 249 - 118
——— v. Dunn, 97 N. Y. 149 - 290
——— v. Fourth Nat. Bank, 77 N. Y. 320 - - - - - 27
——— v. ———, 89 N. Y. 412 - 27
——— v. Walker, 61 Conn. 154 174
Flanders v. Merrimack, 48 W. 567 - - - 425, 427, 429
Flynn v. Bourneuf, 143 Mass. 277 - - - - - 130, 131
Folsom v. Mussey, 10 Me. 297 27
Ford v. Smith, 60 W. 225 - 72
Foster v. Tierney, 91 Iowa, 253 98
Fotterall v. Floyd, 6 Serg. & R. 315 - - - - - - 73
Fowkes v. Manchester & L. L. A. & L. Asso. 3 Best & S. 917 - - - - - - 469
Fox v. Adams, 5 Me. 245 - 174
——— v. Union S. Refinery, 109 Mass. 292 - - - - - 477
Frazier v. Fredericks, 24 N. J. Law, 162 - - - - - 174
Fred Miller B. Co. v. Manasse, 99 W. 102 - - - - - 118
Freeman v. Freeman, 31 W. 235 - - - - - - 190
Frei v. McMurdo, 101 W. 423 - 231
Frey v. D., S. S. & A. R. Co. 91 W. 309 - - - - - 282, 284
——— v. Vanderhoof, 15 W. 397 - - - - - - - 527
Fuller, Will of, 75 W. 431 - 152
Fuller v. Steiglitz, 27 Ohio St. 355 - - - - - - 174
Furlong v. Garrett, 44 W. 111 244

Gagan v. Janesville, 106 W. 662 92
Gage v. Allen, 84 W. 323 - 593
Gager v. Marsden, 101 W. 598 594
Galley v. Galley, 14 Neb. 174 - 163
Galloway v. Hamilton, 68 W. 651 - - - - - - 635
Garden City B. & T. Co. v. Geilfuss, 86 W. 612 - - - 177
Gates v. Boomer, 17 W. 455 633, 634
——— v. Parmly, 93 W. 294 - 145
Gatzow v. Buening, 106 W. 19 483
Gauche v. Milbrath, 105 W. 355 48, 230, 232
Geiser T. M. Co. v. Smith, 36 W. 295 - - - - - - 651
Geisinger v. Beyl, 71 W. 358 - 556
German S. & L. Soc. v. De Lashmutt, 67 Fed. 399 - 643
Gibbons v. U. S. 15 Ct. Cl. 174 95
Gibson v. Moore, 6 N. H. 547 167
——— v. Soper, 6 Gray. 279 - 641
Gilbert v. Pier, 102 W. 334 - 34
——— v. Stockman, 81 W. 602 631–633, 637, 644
Glover v. Hynes L. Co. 94 W. 457 - - - - - 614, 615
Goddard v. G. T. R. Co. 57 Me. 202 - - - - - - 484
Goerke v. Goerke, 80 W. 516 - 215
Gordon v. Tweedy, 71 Ala. 202 163
Gore v. Brucker, 94 W. 68 - 290
Grand Rapids W. P. Co. v. Bensley, 75 W. 399 - - 508
Gray v. Central R. Co. 157 N. Y. 483 - - - - - - 18
Green v. Stacy, 90 W. 46 - 166
——— v. Weller, 32 Miss. 650 83
Greenfield Bank v. Leavitt, 17 Pick. 1 - - - - - - 650
Gregg v. Sloan, 76 Va. 497 - 174
Gribben v. Maxwell, 34 Kan. 8 642
Grossenbach v. Milwaukee, 65 W. 31 - - - - - - 91
Guest v. Reynolds, 68 Ill. 478 270
Guinard v. Knapp, Stout & Co. Company, 95 W. 482 - 260, 311
Hacker v. Hacker, 90 W. 325 - 190
Haley v. Jump River L. Co. 81 W. 426 - - - - - - 317
Hall v. Hall, 98 W. 199 - - 72
Halsey v. Rapid Transit St. R. Co. 47 N. J. Eq. 380 - - 402
Hampton v. Rouse, 13 Wall. 187 73
Hand v. Agen, 96 Wis. 493 - 96
Handy v. Johnson, 5 Md. 450 484
Hannan v. Oxley, 23 W. 519 - 526
Harney v. Burhans, 91 W. 348 537
Harrington v. Buffalo, 121 N. Y. 147 - - - - - 91
——— v. Pier, 105 W. 485 149, 152, 154, 155
——— v. Smith, 28 W. 43 - 425
Harrison v. Juneau Bank, 17 W. 340 - - - - - - 551
Hartford L. & A. Ins. Co. v. Gray, 91 Ill. 159 - - - 470
Hartstein v. W. U. Tel. Co. 89 W. 531 - - - - - - 25
Hartung, *In re*, 98 W. 140 - 180
Hausmann v. Madison, 85 W. 187 - - - - - - 91
Hazen v. West Superior L. Co. 91 W. 208 - - - - - 261
H. B. Claflin Co. v. Grashorn, 99 W. 356 - - - 120, 121
Heater v. Pearce, 81 N. W. 615 27, 28
Heddles v. C. & N. W. R. Co. 74 W. 257 - - - 257, 324
——— v. ———, 77 W. 228 - 324
Heiskell v. Baltimore, 65 Md. 125 - - - - - - 82
Helden v. Helden, 9 W. 557 - 342
Helmke v. Thilmany, 107 W. 216 - - - - - - 263
Hennesey v. C. & N. W. R. Co. 99 W. 109 - - - - 312
Herbst v. Lowe, 65 W. 316 466, 473
Herold v. Pfister, 92 W. 417 - 224
Hess, Will of, 97 W. 244 - 69, 73
Heyer v. Alexander, 108 Ill. 385 - - - - - - 174
Hildebrand v. Carroll, 106 W. 324 - - - - - - 32
Hinckley v. Pfister, 83 W. 64 86
Hiort v. L. & N. W. R. Co. 4 Exch. Div. 188 - - - 651
Hobart v. Milwaukee City R. Co. 27 W. 194 - 389, 392–394, 397, 398, 403
Hodges v. Green, 28 Vt. 358 - 163
Hoile v. Bailey, 58 W. 448 - 551
Holden v. Curry, 85 W. 512 - 409
Hollinshead v. John Stuart & Co. 77 N. W. 89 - - - 415
Hollister v. Young, 42 Vt. 403 523
Holton v. Burton, 78 W. 321 - 174
Holum v. C., M. & St. P. R. Co. 80 W. 299 - - - - - 223
Hooe v. C., M. & St. P. R. Co. 98 W. 302 - - - - - 282
Hooker v. Greene, 50 W. 271 - 243
Hosmer v. McDonald, 80 W. 54 - - - - - - - 537
Hovey v. Hobson, 53 Me. 451 - 642

Howard v. Osceola, 22 W. 453 230
Howe v. West End St. R. Co. 167 Mass. 46 - - - - 402
Hubbard v. Marshall, 50 W. 322 - - - - - - 527
Hulehan v. G. B., W. & St. P. R. Co. 58 W. 319 - - - 312
Hunter v. Maanum, 78 W. 656 461
H. W. Wright L. Co. v. Hixon, 105 W. 153 - - - - 117
Hyde v. Chapman, 33 W. 391 - 631, 632
——— v. Frey, 28 Fed. 819 184, 185
Hyer v. Janesville, 101 W. 371 91, 92, 623

I. De S. v. W. De S. 1 Ames, Cases on Torts, 1, Year Book Lib. Ass. fol. 99, pl. 60 - 484
Ilgenfritz v. Mutual B. L. Ins. Co. 81 Fed. 27 - - - 414
Illinois M. B. Soc. v. Winthrop, 85 Ill. 537 - - - - 469
Illinois S. Co. v. Budzisz, 106 W. 499 - - - - 293, 294
Imhoff v. C. & M. R. Co. 20 W. 344 - - - - - - 378
Indianapolis v. Kingsbury, 101 Ind. 200 - - - - 477
Ingram v. Rankin, 47 W. 406 18, 649
Innes v. Milwaukee, 96 W. 170 260

Jackowski v. Illinois S. Co. 103 Wis. 454 - - - - - 467
Jaynes v. Omaha St. R. Co. 53 Neb. 631 - 395, 399, 401, 403
J. I. Case P. Works v. Niles & Scott Co. 107 W. 9 - - 241
J. I. Case T. M. Co. v. Miracle, 54 W. 295 - - - - 290
Jochem v. Dutcher, 104 W. 611 427
John R. Davis L. Co. v. Hartford F. Ins. Co. 95 W. 226 - 609
Johnson v. Goult, 106 W. 247 53
——— v. Harmon, 94 U. S. 371 643, 644
——— v. Huber, 106 W. 282 - 34
——— v. Johnson, 4 W. 135 - 190
Johnston v. Milwaukee & W. I. Co. 46 Neb. 480 - - 415
——— v. N. W. L. S. Ins. Co. 94 W. 117 - - - 338, 346
Jones v. Florence M. Co. 66 W. 268 - - - - - - 319
——— v. Sutherland, 91 W. 587 - - - - - - 261
Jordan v. Tate, 19 Ohio St. 586 474

Joy v. Vance, 104 Mich. 97 414, 415
J. Thompson Mfg. Co. v. Gunderson, 106 W. 449 - - 15

Kalk v. Fielding, 50 W. 339 - 295
Kansas M. Co. v. Weyerhaeuser, 48 Kan. 335 - - - 98
Kaples v. Orth, 61 W. 531 - 320
Kaukauna W. P. Co. v. Green Bay & M. C. Co. 75 W. 390 336, 508
Kavanagh v. O'Neill, 53 W. 101 200
Kelleher v. M. & N. R. Co. 80 W. 584 - - - - 312, 318
Kelley v. Kelley, 20 W. 443 - 523
——— v. ———, 77 Me. 135 - 615
——— v. Kennard, 60 N. H. 1 7
Kelly v. Kelly, L. R. 2 Prob. & Div. 31 - - - - - 190
——— v. Meeks, 87 Mo. 396 - 664
Kendall v. Hynes L. Co. 96 W. 661 - - - - - 614–618
Kennedy v. L. S. T. & T. R. Co. 93 W. 32 - - - 312, 317
Kent v. Agard, 24 W. 378 - 551
——— v. Lasley, 24 W. 654 - 551
Kickland v. Menasha W. W. Co. 68 W. 34 - - 130, 526
Kimball v. Homan, 74 Mich. 699 - - - - - - 5
Klatt v. N. C. Foster L. Co. 92 W. 622 - - - - - - 224
Klaus v. Green Bay, 34 W. 628 - - - - - - 428, 430
Kleiner v. Madison, 104 W. 339 - - - - - - 91
Klochinski v. Shores L. Co. 93 W. 417 - - - - - - 260
Koch v. Peters, 97 W. 492 120, 121
Kohl v. Beach, 107 W. 409 - 456
Krouskop v. Shontz, 51 W. 204 200
Krueger v. Wis. Tel. Co. 106 W. 96 - - 389, 391, 392, 512
Kucera v. Merrill L. Co. 91 W. 637 - - - - - 207, 319
Kuhl v. C. & N. W. R. Co. 101 W. 54 - - - - - 282, 284
Kunneke v. Mapel, 60 Ohio St. 1 - - - - - - 161
Kusterer v. Beaver Dam, 56 W. 471 - - - - - - 230

La Crosse City R. Co. v. Higbee, 107 W. 389 - - 494, 511
Larson v. Aultman & T. Co. 86 W. 286 - - - - - 178, 451
——— v. Knapp, Stout & Co. Company, 98 W. 178 - 224, 264

Larsson v. McClure, 95 W. 583 261
Lathrop v. Knapp, 27 W. 214 73
——— v. ———, 37 W. 312 - 73
Laycock v. Parker, 103 W. 161 17, 168
Leach v. Leach, 11 Tex. Civ. App. 699 - - - - - 484
Leahy v. Nat. B. & L. Asso. 100 W. 555 - - - - - 386
Lee v. C., St. P., M. & O. R. Co. 101 W. 352 - - 257, 259, 326
Lemke v. Daegling, 52 W. 500 84
Lennig v. Ocean City Asso. 41 N. J. Eq. 606 - - - - 477
Lewis v. Hoover, 3 Blackf. 407 484
Lichtenstein v. New York, 159 N. Y. 500 - - - - - 91
Litchfield v. White, 7 N. Y. 438 - - - - - - - 24
Little v. Superior R. T. R. Co. 88 W. 402 - - - - - 378
Littlejohn v. Regents, 71 W. 437 - - - - - - - 550
Lockhart v. Craig St. R. Co. 139 Pa. St. 419 - - - - 402
Lockwood v. C. & N. W. R. Co. 55 W. 66 - - - - - 264
——— v. Mechanics' Nat. Bank, 9 R. I. 308 - - - 82
Lohman v. Peterson, 87 W. 227 135
Lombard v. McMillan, 95 W. 627 - - - - - - - 81
Lord v. Atkins, 138 N. Y. 184 477
Louisville B. Mfg. Co. v. Central P. R. Co. 95 Ky. 50 395, 402
Luebke v. Berlin M. Works, 88 W. 442 - - 224, 317, 319
Lueck v. Heisler, 87 W. 644 - 295
Lund v. Chippewa Co. 93 W. 646 - - - - - - - 8
Lundgreen v. Stratton, 79 W. 227 - - - - - - - 48
Lynch v. E., L. F. & M. R. Co. 57 W. 430 - - - - - 8

Madison v. Mayers, 97 W. 399 367
Mahan v. Brown, 13 Wend. 261 270
Mahler v. Brumder, 92 W. 477 476, 478
Maldaner v. Smith, 102 W. 30 26
Manitowoc & L. W. R. Co. v. Stolze, 101 W. 93 - - - 283
Manufacturers' Bank v. Rugee, 59 W. 221 - - - 583
Markle v. Akron, 14 Ohio, 586 664
Markwell v. Pereles, 95 W. 406 266
Marshall v. Meech, 51 N. Y. 140 - - - - - - - 230
Marvin v. Hawley, 9 Mo. 378 290
Mattison v. Marks, 31 Mich. 423 - - - - - - - 474
Mayers v. Kaiser, 85 W. 382 184, 185
McArthur v. Slauson, 53 W. 41 533, 534
McAuliffe v. Jorgenson, 107 W. 132 - - - - - - 616
McClure v. Campbell, 71 W. 350 - - - - - - - 175
McCormick v. Herndon, 67 W. 648 - - - - - - - 551
——— v. Ketchum, 48 W. 643 161
McCown v. Russell, 84 W. 122 119
McCristal v. Cochran, 147 Pa. St. 225 - - - - - - 99
McDermott v. Jackson, 102 W. 419 - - - - - - - 206
McGowan v. Supreme Court, 104 W. 178 - - 463, 467, 469
McGregor v. Auld, 83 W. 546 231
McKeague v. Green Bay, 106 W. 577 - - - - - - 565
McLemore v. McNeley, 56 Mo. App. 556 - - - - - 477
McManus v. D., C. & N. R. Co. 51 Minn. 30 - - - - - 145
McMillen v. Pratt, 89 W. 612 162
McNally v. Cohoes, 127 N. Y. 350 - - - - - - - 91
Meade v. Black, 22 W. 241 - 523
Meador v. L. S. & M. S. R. Co. 138 Ind. 290 - - - - - 58
Means v. Hapgood, 19 Pick. 105 - - - - - - - 174
Menz v. Beebe, 102 W. 350 - 34
Menzesheimer v. Kennedy, 75 W. 411 - - - - - - 118
Metcalf v. St. Louis, 11 Mo. 102 664
Metzger v. Hochrein, 107 W. 267 - - - - - - - 299
Michelstetter v. Weiner, 82 W. 298 - - - - - - - 118
Middleton v. Jerdee, 73 W. 44 377
Mielke v. C. & N. W. R. Co. 103 W. 3 - - - - - 311
Miller v. Kernaghan, 56 Ga. 155 - - - - - - - 174
——— v. Mariner's Church, 7 Me. 51 - - - - - - 58
——— v. Price, 20 W. 117 - 161
Miller B. Co. v. Manasse, 99 W. 102 - - - - - - - 118
Mills v. C. & N. W. R. Co. 103 W. 192 - - - - - - 526
Minneapolis H. Works v. Bonnallie, 29 Minn. 378 - - 18

Minnesota L. Co. v. Whitebreast C. Co. 160 Ill. 85 - 238
Minton v. Underwood L. Co. 79 W. 648 - - - - 614
Mitchell v. Plover, 53 W. 548 - 430
——— v. Rochester R. Co. 151 N. Y. 107 - - - - - 483
Montreal River L. Co. v. Mihills, 80 W. 551 - - - 257
Morgan v. Bishop, 61 W. 407 - 293, 294
——— v. Hammett, 23 W. 30 408
——— v. ———, 34 W. 512 - 556
——— v. South Milwaukee L. V. Co. 97 W. 275 - - 130, 526
Morice v. Bishop of Durham, 9 Ves. 406 - - - - - 154
Morris v. W. M. R. Co. 82 W. 541 - - - - - - - 283
Morse v. Stockman, 65 W. 36 - 244
Mortin v. Shoppee, 3 Car. & P. 378 - - - - - - - 484
Moses v. P., Ft. W. & C. R. Co. 21 Ill. 516 - - - - - 396
Mowry v. Crocker, 6 W. 326 - 174
Mueller v. Wiese, 95 W. 381 - 200
Mulberger v. Beurhaus, 102 W. 1 - - - - - - - 504
Murphy v. Barnard, 162 Mass. 72 - - - - - - 415, 417
Mutual B. L. Ins. Co. v. Miles, 81 Fed. 32 - - - - - 414
——— v. Rowand, 26 N. J. Eq. 389 - - - - - - 99
Mytton v. Mytton, 11 Prob. Div. 141 - - - - - 191

Nadau v. White River L. Co. 76 W. 120 - - - 317, 319
Nass v. Schulz, 105 W. 146 - 624
Nast v. Eden, 89 W. 610 - 502
National F. Co. v. Keystone Mfg. Co. 110 Ill. 427 - - 239
Naylor v. C. & N. W. R. Co. 53 W. 661 - - - - - - 311
Neave v. Arntz, 56 W. 174 - 469
Negley v. Jeffers, 28 Ohio St. 90 - - - - - - - 163
Neilon v. Marinette & M. P. Co. 75 W. 579 - - - - 319
Nelson v. Stephens, 107 W. 136 581
Nelson L. Co. v. Loraine, 24 Fed. 456 - - - - - 603
Newell v. M., L. & M. R. Co. 35 Minn. 112 - - - - - 395
——— v. Whitcher, 53 Vt. 589 485
New Home S. M. Co. v. Simon, 104 W. 120 - - - - - 374
New York v. Mabie, 13 N. Y. 151 - - - - - - - 277
New York L. Ins. Co. v. Fletcher, 117 U. S. 519 - 467
Nichol v. Thomas, 53 Ind. 42 - 642
Nichols v. Ann Arbor & Y. St. R. Co. 87 Mich. 361 - 395, 402
Nightingale v. Barens, 47 W. 389 - - - - - - - 461
Niland v. Murphy, 73 W. 326 - 163
Noble v. Smith, 6 R. I. 446 - 174
Noonan v. Orton, 4 W. 335 - 73
——— v. ———, 27 W. 300 - 73
Norris v. Cargill, 57 W. 251 - 295
North Carolina R. Co. v. Comm'rs, 82 N. C. 259 - - 426
North Hudson M. B. & L. Asso. v. Childs, 82 W. 460 - - 87
North Milwaukee, *In re*, 93 W. 616 - - - - - 663, 664
North Shore R. Co. v. Pion, 14 App. Cas. 621 - - - 336

O'Connor v. F. du L., A. & P. R. Co. 52 W. 526 - - - 490
Odom v. Riddick, 104 N. C. 515 - - - - - - - 642
Ogden City R. Co. v. Ogden City, 7 Utah, 207 - - - 402
Oppenheimer v. Morrell, 118 Pa. St. 189 - - - - - 616
Osborn v. Hart, 24 W. 89 - 6
Osborne v. Lehigh Valley C. Co. 97 W. 27 - - - 261, 311

Paige & S. L. Co., *In re*, 31 Minn. 136 - - - - - 174
Paine v. Eastern R. Co. 91 W. 340 - - - - - - - 312
Parish v. Eden, 62 W. 272 560, 565
Parker v. Kane, 4 W. 1 - - 429
——— v. Marco, 76 Fed. 510 - 643
Parks v. Boston, 8 Pick. 218 - 7
Parroski v. Goldberg, 80 W. 339 - - - - - - - 649
Parry v. Spikes, 49 W. 384 574, 576
Patten P. Co. v. Green Bay & M. C. Co. 93 W. 283 - - 84
Pearson v. Yewdall, 95 U. S. 294 - - - - - - - 73
Pedrick v. Ripon, 73 W. 622 - 502
Pennock v. Hoover, 5 Rawle, 291 - - - - - - - 99
People v. Kerr, 27 N. Y. 188 - 395
People *ex rel.* Att'y Gen. v. Utica Ins. Co. 15 Johns. 358 450
——— Ellert v. Cogswell, 113 Cal. 129 - - - - - 152

People *ex rel.* Fortune v. Pleasant Hill, 67 Ill. App. 415 - 352
——— McKinch v. B. & R. T. P. Road, 23 Wend. 537 - 222, 453
——— Ridgeway v. Cortelyou, 36 Barb. 164 - - - 5
Pepin Co. v. Prindle, 61 W. 311 - - - - - - 8
Perkins v. Blood, 36 Vt. 273 - 523
——— v. McAuliffe, 105 W. 582 130
Peter v. Kendal, 6 Barn. & C. 703 - - - - - 452
Peters v. Myers, 22 W. 602 - 425
Pettibone v. Hamilton, 40 W. 402 - - - - - - 508
Phelps v. Nowlen, 72 N. Y. 40 270
Pier v. Fond du Lac Co. 53 W. 421 - - - - - - 508
Pireaux v. Simon, 79 W. 392 - 163
Plum v. Fond du Lac, 51 W. 393 - - - - - 426, 430
Plumer v. Marathon Co. 46 W. 171 - - - - - - 429
Powell v. Ashland I. & S. Co. 98 W. 35 - - - - - 261
Powers v. Spaulding, 96 W. 487 - - - - 130, 526
Proulx v. Stetson & P. M. Co. 6 Wash. 478 - - - 616, 617
Prybilski v. N. W. C. R. Co. 98 W. 413 - - - - - 260
Purcell v. English, 86 Ind. 34 58
Putnam v. Sweet, 2 Pin. 302 - 447

Quicksall v. Philadelphia, 177 Pa. St. 301 - - - - - 478

Racine v. Emerson, 85 W. 80 - 366, 367
——— v. J. I. Case P. Co. 56 W. 539 - - - - - - 367
Ragon v. T., A. A. & N. M. R. Co. 97 Mich. 265 - - - 312
Railway Co. v. Telegraph Asso. 48 Ohio St. 390 - - 402
Ranelagh, Lord, v. Melton, 10 Jur. (N. S.), 1141 - - - 145
Rathke v. Gardner, 134 Mass. 16 - - - - - - - 491
Redman v. Hartford F. Ins. Co. 47 W. 89 - - - 237, 469
Reed v. Madison, 83 W. 171 - 430
Reid Bros. & Co. v. Norfolk City R. Co. 94 Va. 117 - - 395
Reinhard v. Reinhard, 96 W. 555 - - - - - - 190
Relyea v. Tomahawk P. & P. Co. 102 W. 306 - - - 430
Remington v. Palmer, 62 N. Y. 31 - - - - - - - 163
Renne v. U. S. L. Co. 107 W. 305 - - - - 222, 268
Rex v. Barham, 8 Barn. & C. 99 432
——— v. Bellringer, 4 Term, 810 - - - - - - 82
——— v. Greame, 2 Adol. & E. 615 - - - - - - 358
——— v. Williams, 1 Burrows, 402 - - - - - - 448
Rice v. Garnhart, 35 W. 282 - 230
——— v. Milwaukee, 100 W. 516 - - - - - - 503
——— v. Roberts, 24 W. 461 - 163
Richards v. Citizens N. G. Co. 130 Pa. St. 37 - - - 18
Richardson v. Hardwick, 106 U. S. 252 - - - - 145
Rideout v. Knox, 148 Mass. 368 270
Riggs v. Am. T. Soc. 95 N. Y. 503 - - - - - - 641
Rindskopf v. Myers, 87 W. 84 584, 587
Robertson v. Edelstein, 104 W. 440 - - - - - - 362
Roebke v. Andrews, 26 W. 311 523
Roebling v. Trenton P. R. Co. 58 N. J. Law, 666 - - - 395
Rogan v. Walker, 1 W. 527 - 551
Rood v. Taft, 94 W. 380 - - 462
Rose v. Bradley, 91 W. 619 - 167
Roth v. S. E. Barrett Mfg. Co. 96 W. 615 - - - 224, 326
Russell v. Walker, 150 Mass. 531 111
Ryan v. Tomlinson, 39 Cal. 639 163
Rysdorp v. George Pankratz L. Co. 95 W. 622 - - - 264

Sable v. Maloney, 48 W. 331 - 551
Sage v. Fifield, 68 W. 546 - 603
St. Sepulchre's, *Ex parte* Vicar, etc., of, 33 Law J. Ch. 372 - 434
Salter v. Bank of Eau Claire, 97 W. 87 - - - 130, 526
Salzer v. Milwaukee, 97 W. 471 92
Sawtelle v. Witham, 94 W. 412 153
Schæffner, Appeal of, 41 W. 260 408
Schaidler v. C. & N. W. R. Co. 102 W. 564 - - - - 206
Schild v. Legler, 82 W. 73 - 362
Schneider v. C., M. & St. P. R. Co. 99 W. 387 - - - 222
——— v. Kraby, 97 W. 519 - 583
Schoenleber v. Burkhardt, 94 W. 575 - - - - 357, 409
Schroeder v. Richardson, 101 W. 529 - - - - - - 357

Schumaker v. Heinemann, 99 W. 251 - - - - - - 240
Schweitzer v. Connor, 57 W. 177 - - - - - - 538
Scott v. Goldinghorst, 123 Ind. 268 - - - - - - 99
——— v. Reese, 88 W. 636 - 593
Seamans v. Carter, 15 W. 548 427
Second Nat. Bank v. Larson, 80 W. 469 - - - - - 56
Second Ward S. Bank v. Schranck, 97 W. 250 - - 174
Security T. Co. v. Dodd, M. & Co. 173 U. S. 624 - - - 175
Segnitz v. Garden City B. & T. Co. 107 W. 171 - - - 451
Sellers v. Union L. Co. 86 W. 398 - - - - - - 593
Seymer v. Lake, 66 W. 651 - 210
Seymour v. Cushway, 100 W. 580 - - - - - - 162
Shadbolt & B. I. Co. v. Topliff, 85 W. 513 - - - - - 236
Shanney v. Androscoggin Mills, 66 Me. 420 - - - 312
Shealy v. C., M. & N. R. Co. 72 W. 471 - - - - - - 356
Simonsen v. Herold Co. 61 W. 626 - - - - - - - 362
Simpson v. Sneclode, 83 W. 201 244
Slaughter v. Bernards, 97 W. 184 - - - - - - 118
Slivitski v. Wien, 93 W. 463 - 563
Smith v. C. & N. W. R. Co. 19 W. 89 - - - - - - - 342
——— v. Conway, 17 N. H. 586 7
——— v. Hoyt, 14 W. 252 - 302
——— v. Morse, 20 La. Ann. 220 - - - - - - - 238
——— v. Postal T. C. Co. 174 Mass. 576 - - - - - 483
——— v. Putnam, 107 W. 155 200
South Royalton Bank v. Suffolk Bank, 27 Vt. 505 - - 270
Southworth v. P. & J. R. Co. 2 Mich. 287 - - - - - 83
Spade v. L. & B. R. Co. 168 Mass. 285 - - - - - 483
——— v. ———, 172 Mass. 488 483
Spitz v. Tripp, 86 W. 25 - - 290
Spruhen v. Stout, 52 W. 517 - 98
Stanley v. Carey, 89 W. 410 - 229
State v. Collins, 6 Ohio, 126 - 8
——— v. Justice, 24 N. J. Law, 413 - - - - - - - 8
——— v. Langer, 29 W. 68 - 5
——— v. Logue, 73 W. 598 - 5
——— v. St. Croix B. Corp. 60 W. 565 - - - - - - 180
State *ex rel.* Adams v. Burdge, 95 W. 390 - - - 663, 664
——— Att'y Gen. v. Circuit Court, 97 W. 1 - - - - 335
——— ——— v. Janesville W. Co. 92 W. 496 - - - 517
——— ——— v. Madison St. R. Co. 72 W. 612 - 445, 446, 668
——— ——— v. M., L. S. & W. R. Co. 45 W. 579 - - - 180
——— ——— v. Portage City W. Co. 107 W. 441 - 514, 668
——— Buchanan v. Kellogg, 95 W. 672 - - 352, 353, 355
——— Cadmus v. Farr, 47 N. J. Law, 208 - - - - - 83
——— Carpenter v. Hastings, 10 W. 518 - - - - - 352
——— Childs v. Darrow, 65 Minn. 419 - - - - - 669
——— Dakota Co. Comm'rs v. Barton, 36 Minn. 145 - - 5
——— Faires v. Buhler, 90 Mo. 560 - - - - - 352, 353
——— G. B. & M. R. Co. v. Jennings, 56 W. 113 - - - 355
——— Giblin v. Sup'rs, 68 W. 158 - - - - - 380, 381
——— Gray v. Common Council, 104 Wis. 622 - - - 424
——— Heiden v. Ryan, 99 W. 123 - - - - - 425, 432
——— La Valle v. Sauk Co. 62 W. 376 - - - - - - 352
——— Lightfoot v. McCabe, 74 W. 481 - - - 6, 352
——— Meggett v. O'Neill, 104 W. 227 - - - - - - 335
——— Milwaukee v. Ludwig, 106 W. 226 - - 283, 493, 502
——— Newell v. Purdy, 36 W. 225 - - - - - - - 8
——— Park v. Sup'rs, 24 W. 49 - - - - - - - - 8
——— Pfister v. Manitowoc, 52 W. 427 - - - - - 352
——— Radl v. Shaughnessey, 86 W. 646 - - - - - 180
——— Rogers v. Wheeler, 97 W. 96 - - - - - - 5
——— Sweet v. Cunningham, 88 W. 81 - - - - - 429
——— Wood v. Baker, 38 W. 71 180
——— ——— v. Goldstucker, 40 W. 124 - - - - - 5
Stedman v. Berlin, 97 W. 505 445, 516, 517, 519
Steele v. Bond, 32 Minn. 14 - 145
Steinam v. Schulte, 83 W. 567 653

Stephens v. Myers, 4 Car. & P. 349 - - - - - - 484
Sterling v. Ryan, 72 W. 36 50, 54
Stevens v. Breen, 75 W. 595 - 118
Stewart-Chute L. Co. v. M. P. R. Co. 28 Neb. 39 - - - 616
Stilz v. Indianapolis, 55 Ind. 515 - - - - - - 664
Stites v. Thompson, 98 W. 330 130, 526
Storer v. Eaton, 50 Me. 219 - 27
Straker v. Phenix Ins. Co. 101 W. 413 - - - - - 467, 469
Strong v. High, 38 Am. Dec. 195 - - - - - - 27
——— v. McCagg, 55 W. 624 - 86
Studley v. Oshkosh, 45 W. 380 211
Sturges v. Carter, 114 U. S. 511 425, 429
Sullivan v. Oshkosh, 55 W. 508 - - - - - - 211
Summerfield v. W. U. Tel. Co. 87 W. 1 - - - - - 483, 484
Sutherland v. Parkins, 75 Ill. 338 - - - - - - 143
Sutton v. C., St. P., M. & O. R. Co. 98 W. 157 - - - - 298

Taggart v. Newport St. R. Co. 16 R. I. 668 - - - - 400, 402
Talcott v. Cowdry, 39 N. Y. Supp. 1076 - - - - - 27
Tallman v. Janesville, 17 W. 71 - - - - - - - - 425
Taylor v. Comm'rs, 88 Ill. 526 5
——— v. C. & N. W. R. Co. 103 W. 27 - - - - - - 324
——— v. P., K. & Y. St. R. 91 Me. 193 - - - - - - 402
——— v. Pratt, 3 W. 674 574, 576, 577
——— v. Williams, 14 W. 155 48, 49
Thoemke v. Fiedler, 91 W. 386 492
Thomas v. Mowers, 27 Kan. 265 99
Thompson v. Edward P. Allis Co. 89 W. 523 - - - - 222
——— v. Johnston Bros. Co. 86 W. 576 - - - - - 319
——— v. People *ex rel.* Taylor, 23 Wend. 537 - - - - 450
Thompson Mfg. Co. v. Gunderson, 106 W. 449 - - - - 15
Thrall v. Newell, 19 Vt. 202 - 237
Tietz v. Tietz, 90 W. 66 - - 534
Tobin v. Deal, 60 W. 87 - - 648
Tolford v. Tolford, 44 W. 547 161
Tombs v. Painter, 13 East, 1 - 484
Torrence v. Shedd, 156 Ill. 194 237
Town v. Armstrong, 75 Mich. 580 - - - - - - 58
Townes v. Nichols, 73 Me. 515 352
Townley v. C., M. & St. P. R. Co. 53 W. 626 - - - - 320
Townsend v. Coxe, 151 Ill. 62 175
——— v. Hoyle, 20 Conn. 1 - 8
Treat v. Hiles, 68 W. 344 - 161
——— v. ———, 81 W. 280 - 240
Tripp v. Childs, 14 Barb. 85 - 184
Trowbridge v. Ross, 105 Mich. 598 - - - - - - 415
——— v. Wetherbee, 11 Allen, 361 - - - - - 161, 163

Ulrich v. Farrington Mfg. Co. 69 W. 214 - - - - - 342
Unger v. Smith, 44 Mich. 22 130, 131
Upham v. Hewitt, 42 W. 85 - 161

Vail v. People, 1 Wend. 38 - 356
Valentine v. Lunt, 115 N. Y. 496 - - - - - - 641
Valpey v. Rea, 130 Mass. 384 - 641, 642
Vanderpoel v. Gorman, 140 N. Y. 568 - - - - - 178
Vanderpool v. L. C. & M. R. Co. 44 W. 663 - - - - 427
Van Deusen v. Sweet, 51 N. Y. 378 - - 639, 640, 643, 644
Van Wyck v. Read, 43 Fed. 716 - - - - - - 174
Vassalborough, *In re*, 19 Me. 338 - - - - - - 8
Victorian R. Comm'rs v. Coultas, 13 App. Cas. 225 - - 483
Vilas v. McDonough Mfg. Co. 91 W. 607 - - - - 97, 98
Vollmer v. C. & N. W. R. Co. 86 W. 305 - - - - - 290
Vorbrich v. Geuder & P. Mfg. Co. 96 W. 277 - - - 319

Wachholz v. Wachholz, 75 W. 377 - - - - - - 190
Waldheim v. Miller, 97 W. 300 112–113
Walker v. Fuller, 29 Ark. 448 650
Walsh v. Myers, 92 W. 397 - 237
Walters v. St. Joseph F. & M. Ins. Co. 39 W. 489 - - 610
——— v. Whitlock, 9 Fla. 86 - 174
Ward v. C., M. & St. P. R. Co. 102 W. 215 - - - - 206, 259
——— v. Henry, 19 W. 76 - 378
Warden v. Fond du Lac Co. 14 W. 618 - - - - - - 425

Warder v. Baldwin, 51 W. 450 649
——— v. Fisher, 48 W. 338 - 15
Waterman v. C. & A. R. Co. 82 W. 613 - - - - - 324
Waufle v. McLellan, 51 W. 484 379
Weadock v. Kennedy, 80 W. 449 - - - 291, 295, 523
Webber v. Ward, 94 W. 605 - 71
Webster v. Douglas Co. 102 W. 181 - - - - - 503, 601
Weider v. Maddox, 66 Tex. 372 174
Whetstone v. Shaw, 70 Mo. 575 161
Welsh v. Argyle, 89 W. 649 - 264
——— v. Cochran, 63 N. Y. 181 111
Western Ass. Co. v. Towle, 65 W. 247 - - - - - - 107
Whitcomb v. Provost, 102 W. 278 - - - - - - 244
White v. Chapin, 12 Allen, 516 491
Wilcox v. Eagle, 81 Mich. 271 425
Wilkins v. Nicolai, 99 W. 181 492
Willcocks, *Ex parte*, 7 Cow. 402 - - - - - - 82
Wille v. Bartz, 88 W. 424 - 330
Williams v. City E. St. R. Co. 41 Fed. 556 - - - 395, 402
Wilson v. Acree, 97 Tenn. 378 477
——— v. Bicknell, 170 Mass. 259 - - - - - - 474
Wilson v. Campbell, 110 Mich. 580 - - - - - - 415
——— v. Wilson, 26 Pa. St. 394 - - - - - - 27
Winner v. Hoyt, 66 W. 227 - 118
Winslow v. Urquhart, 39 W. 260 - - - - - - 614
Wintringham v. Lafoy, 7 Cow. 735 - - - - - - 110
Wis. W. Co. v. Winans, 85 W. 39 - - - - - - - 6
Wolf River L. Co. v. Pelican B. Co. 83 W. 426 - - - 248
Wolfe v. Sullivan, 133 Ind. 331 477
Wollman v. Ruehle, 104 W. 603 215
Wolski v. Knapp, Stout & Co. Company, 90 W. 178 - - 319
Woodworth v. Mills, 61 W. 44 29
Wormell v. M. C. R. Co. 79 Me. 397 - - - - - - 312
Wright v. Milwaukee E. R. & L. Co. 95 W. 29 - - - 445
Wright L. Co. v. Hixon, 105 W. 153 - - - - - - 117

Young v. French, 35 W. 111 - 614

Zehren v. Milwaukee E. R. & L. Co. 99 W. 83 - - 393, 403

IN MEMORIAM.

DEATH OF JUDGE GEORGE E. SUTHERLAND.

On the 21st day of June, 1900, Mr. J. G. Flanders of Milwaukee presented to the court the following

Memorial of the Milwaukee Bar Association.

To the President and Members of the Milwaukee Bar Association:—Your committee upon whom was placed the duty of preparing a memorial on the life and services of GEORGE E. SUTHERLAND, beg leave to report:

Death has once more entered our ranks and suddenly snatched from us an honored member of this bar, an able and distinguished jurist. By decree of the Court from which there is no appeal it was his to lay down the burden of life and pass from among us while yet in what seemed to be the prime and vigor of an active and successful career. The last year of his life found him as active and assiduous in the discharge of duty as any of the many busy years which preceded it, and faithful to every trust confided to him; always careful, industrious, and conscientious in the administration of justice. The bar and the bench were honored by him and his work. It is therefore peculiarly fitting that with the warmth of true friendship, as well as with a glow of pride, the bar of Milwaukee county should pay tribute to the life of him whose sterling character and rich judicial attainments were here recognized and appreciated.

GEORGE E. SUTHERLAND, Judge of the Superior Court of Milwaukee County, passed from this life at Chicago on the morning of September 13, 1899. He was born at Burlington, New York, September 14, 1843, and with his parents came to Wisconsin in 1855. He attended school at Ripon College, and subsequently graduated at Amherst College. His law course was taken at Columbia College law school, from which he graduated in 1871.

He opened an office at Ripon, Fond du Lac county, and served as city attorney for two years. He then removed to Fond du Lac, and was associated in business with a distinguished member of the bar, DAVID TAYLOR, later justice of the supreme court, the firm being Taylor & Sutherland. He served one term in the state senate; was postmaster for a term in the city of Fond du Lac; and after Mr. TAYLOR was elected

to the supreme bench practiced law at Fond du Lac a number of years. He came to Milwaukee in 1886, and entered into business with Joshua Stark, and continued to practice at this bar until the spring of 1897, when he was elected to and assumed the duties of judge of the superior court of Milwaukee county, and continued in the active discharge of his trust until the 16th day of June, 1899, when he adjourned court for the summer vacation and departed on a trip to Europe. He had reached Chicago on his way home, and expected to return to Milwaukee the following day, when he was suddenly taken sick and died.

Although barely twenty-eight months have passed since GEORGE E. SUTHERLAND was invested with judicial honors, the members of this bar will bear witness that in patience and in kindness, and with wise judicial discretion, he held the scales of justice with a steady hand, uninfluenced by prejudice, fear, or favor, careful only of the law of which he was a zealous student. As a trial judge he was uniformly patient and kind in his treatment of both counsel and witnesses. The judicial qualities of his mind were admirable, and he gave to his work the highest and best of which he was capable. His was a sunny and genial disposition, and he made the way easier and more pleasant for many a struggling young attorney. The highest good was his great ambition in his social, business, and church relations. Sublime is such ambition.

RESOLVED, That in the passing of GEORGE E. SUTHERLAND, the state has lost an honored official; this bench and bar a learned and just judge; the people a firm friend; Christianity a witness; and humanity a man.

RESOLVED, That this memorial be presented to the circuit court of Milwaukee county, and to the supreme court of the state of Wisconsin, upon a day to be named, for a formal announcement of the death of Judge GEORGE E. SUTHERLAND, with a request to each court that the memorial may be spread upon the records thereof.

RESOLVED, that the members of this bar attend the funeral of Judge SUTHERLAND in a body.

RESOLVED, that a copy of this memorial be presented to the children and family of the late Judge SUTHERLAND.

Dated, Milwaukee, Wis., September 15, 1899.

CHAS. QUARLES, Chairman,
ROLLIN B. MALLORY,
ORREN T. WILLIAMS,
E. H. BOTTUM,
CHRISTIAN DOERFLER,
Committee.

Mr. Flanders then said:

GEORGE E. SUTHERLAND, born in the state of New York in September, 1843, left an orphan at a tender age, sheltered during the years of

his early youth in the home of a brother, using all the means of education open to a boy upon a farm, teaching a country school at an age no greater than that of many of his pupils, a private in the army in the early fall of 1861, serving continuously until the close of the war and mustered out as a captain when he had barely attained his majority: these are the bare lines of the life of the judge whose death created a vacancy in the superior court of Milwaukee county. These are lines not only in his life but in the life of many Americans whose younger days antedated or were coeval with those stirring days in the sixth and seventh decades of this century.

Emerging from that struggle, he at once engaged in another for a university and professional education. He achieved his purpose through stern self-denial and unfailing persistence, graduated at Amherst in 1870, at Columbia Law School in 1871, and entered the practice of his profession at Ripon in this state. Having subsequently as the partner of a former justice of this court filled a creditable place in the profession and become an influential citizen of Fond du Lac where he lived, he removed to Milwaukee in 1886. With its large German population which establishes a conservatism seldom found elsewhere, it is not easy for a newcomer to make much of an impression in Milwaukee. Judge SUTHERLAND was not an exception to this rule. Those who knew him respected his character and ability, and the lawyers were, of course, the first to realize his worth.

In the spring of 1897, by election, he became the judge of the superior court, and for two and a half years filled that office. It was a brief period in which to make a record as a judge, but it was quickly found that he possessed some qualities much to be desired in the judicial character. Some judges are petulant and impatient. Judge SUTHERLAND'S courtesy was unfailing and his patience apparently inexhaustible. Many judges have been dilatory and procrastinating. Cases argued and submitted, slumbering "under advisement" for months and perhaps for years, frequently crumble until nothing remains for the litigants when the decisions is rendered but costs and the ashes of disappointment. From the time he took his place upon the bench, Judge SUTHERLAND was from choice and habit always prompt in rendering his decisions.

He was not a man of extraordinary ability. Few men in a generation or a community so tower above their fellows as to be ranked among the great. Many of those who are have in their lives and character such defects and blemishes as are only excused or overlooked by reason of conspicuous ability. But Judge SUTHERLAND was, in every sense of the word, an able man. He possessed an unblemished character and his life, public and private, was without reproach. He commanded the respect and esteem of all who came in contact with him and the affection

of those who enjoyed his friendship. His sense of duty was high: his appreciation of the obligations of his office keen; his determination to administer justice impartially and without fear or favor unfailing; and his industry unflagging. In the brief period he held the office of judge he won and retained the respect and confidence of the entire bar of Milwaukee, although many of its members had but slight acquaintance with him when he took his place upon the bench.

In the vain effort to restore failing health, and feeling himself under the sentence of death from a fatal disease, he made his trip to Europe in the last summer of his life. At the very conclusion of his journey, in the great city of our sister state, and almost at the threshold of his home where his children awaited him, he passed away. Notwithstanding the shock to those allied to him by ties of blood and friendship, his friends cannot but feel that if death was to come it was better to have it come quickly. A long and honorable life had been lived, and he left his position upon the bench and in the community in the full possession of all his faculties and with his armor on. The world is better for his life, and such tribute as can be given to it his fellow lawyers in Milwaukee desire to pay.

On behalf of the court, Mr. Justice WINSLOW responded as follows:

Gentlemen of the Bar: — Twice within the space of a few brief years have the bench and bar been called upon to mourn the death of a judge of the superior court of Milwaukee county. Both of the men so commemorated were suddenly called, both were comparatively young, both gifted above their fellows, and both had before them apparently long and honorable careers. FRANKLIN L. GILSON and GEORGE E. SUTHERLAND are names of which any bar and any bench may well feel proud, names which should not pass from us without the making of an enduring record which shall bear witness to future generations of the virtue of the men who bore them so well.

Judge SUTHERLAND was widely known as a lawyer before he was called to the trial bench. At the bar he had attained an enviable position. To the natural brilliancy of his mental powers there was added industry and integrity as well as a charming personality which endeared him to all who enjoyed the good fortune of his acquaintance. His experience upon the bench had been short, perhaps too short to justify a definite and certain estimate of his judicial qualities, but we may be well assured that, had he lived, he would have taken rank among the strong and able trial judges of the state. He did with cheerful heart the work which lay before him; his hand and brain were arrested midway, before they began to fail, even before they were weary; and we

who still remain do well to stop for a few brief moments to reflect upon and profit by the lesson of his short but honorable career, before again taking up life's wearisome struggle which shall end only when death calls us, as it has called our brother.

DEATH OF JUDGE DANIEL HARRIS JOHNSON.

Judge Geo. H. Noyes of Milwaukee then presented to the court the following

Memorial of the Milwaukee Bar Association.

We are summoned to pay the tribute of respect due to the memory of an honored member of the bar of this city. The sudden death of Judge JOHNSON terminates a career distinguished far beyond that of the average lawyer, not alone because of the prominent position he gained at the bar, or of his long residence in this city and state, but because of his protracted service on the bench and his re-election after he had passed the age when most men have retired from active labor.

DANIEL HARRIS JOHNSON was born near Kingston, in Ontario, July 27, 1825. His father had served for several years as a sergeant in the British army under Wellington and was sent to America in military service during the war of 1812, while his mother was a daughter of an American soldier of the revolution. Left an orphan when but two years old, he came under the care of his mother's sister residing at Kemptville, some miles from Kingston. Here in the freedom of country life he passed his childhood and youth with little opportunity for school instruction; but so well did he improve such advantages as were open to him that he became a teacher at the age of seventeen. His active mind and the strong desire to find a wider and better field for the development of his powers impelled him to push out into the then new West.

In 1844, at the age of nineteen, he became a student at Rock River Seminary in Mt. Morris, Illinois, where he remained during the winter of that year and the summer of 1845. During the next three or four years he was engaged in teaching and working in the mines of Galena.

In 1848, he taught in Prairie du Chien, Wisconsin, and at the same time pursued the study of law and literature. In 1849 he was admitted to the bar by the circuit court in Crawford county, Wisconsin, and opened a law office at Prairie du Chien. In 1850 he undertook the labor of taking the census of the Indians about the head of Lake Superior, and spent some time in that region in this service. He early showed a decided fondness for literature and talent as a writer. After three or

four years of moderate success as a lawyer, he became part owner of the *Prairie du Chien Courier*, which he edited with vigor until 1856, when he disposed of his interest and resumed the active practice of the law as a member of the firm of Johnson & Bullock.

While residing in Prairie du Chien he also served for some years as assistant register of the United States land office, there located, and in the fall of 1860 was elected to represent his district in the state Assembly. He took a prominent and influential position in the legislature of 1861, being chairman of the committee on ways and means and a member of the committee on education. The sound judgment and legal ability displayed by him as a legislator led to his appointment in the fall of 1861, by Attorney General James H. Howe, as assistant attorney general of the state. In this position he proved himself able and efficient.

In May, 1862, he went south as a clerk in the paymaster's department in the Union army under Major Culver, and remained there until November 1st of that year. On his return from the South he established his home in Milwaukee, where it remained until his death. Here he entered at once upon the active practice of his profession, and soon came to be recognized as a lawyer of unusual ability and learning.

In 1867, he was a member of a committee which undertook the revision of the city charter. In 1869, and again in 1870, he was elected to represent the Seventh ward of the city in the state Assembly. In 1869 he was chairman of the committee on education, and in 1870 of the judiciary committee, of that body, and was very prominent and influential in shaping and directing the legislation of both sessions, particularly in securing the passage of important measures affecting the interests of Milwaukee.

In 1873 and 1874, and again in 1882 and 1883, he was a member of the school board of the city, representing the First ward in that body with signal intelligence and fidelity. In the spring of 1878, he was elected city attorney for the term of two years, and discharged the duties of that responsible and laborious office with such excellent judgment and professional skill as to greatly enhance his standing at the bar and strengthen his hold upon public confidence.

During the twenty-five years of his practice in Milwaukee, from 1862 to 1887, Judge Johnson was associated with several different lawyers. In the first ten years he was associated with Robert N. Austin (late judge of the superior court) and Nathan Pereles in the firm of Austin, Pereles & Johnson; with D. G. Rogers in the firm of Rogers & Johnson; and with H. H. Markham in the firm of Markham & Johnson.

In the spring of 1871, he formed a law partnership with Frederick Rietbrock, under the title "Johnson & Rietbrock," to which Mr. L. W.

Halsey was admitted as junior partner in 1877, and this firm was continued with a large and increasing practice until Judge JOHNSON retired to accept judicial honors.

At the spring election of 1887, he was chosen by the electors of Milwaukee county to fill the high office of judge of the circuit court for a full term of six years, at the expiration of which he was re-elected without opposition for a second term. In 1899 he was again elected against strong competition, and entered upon his third term on the first Monday of January of the current year, having passed the age of seventy-four years, of which nearly fifty had been spent in active and assiduous professional and judicial labors.

That Judge JOHNSON was a man of great learning and of marked ability it is needless to affirm. His prominence and work as a jurist attest the fact. Though not favored with the usual advantages of a liberal education, yet his open and receptive mind, his ready wit, his keen apprehension, his eager pursuit of knowledge, his superior natural endowments, his remarkable, almost phenomenal, memory, fully supplied the lack of such advantages. He was an extensive reader, fond of investigation, and his mind was stored with a large fund of knowledge upon most subjects that interest men of intelligence. In the fields of history, science, politics, and literature, as well as jurisprudence, he was at home and his conversation was always interesting and instructive. His tastes were literary, and from time to time he indulged them by contributing to the current literature of the day. His library was large and well selected, but it was kept not for ornament but for practical and steady use. His extraordinary memory, particularly in the recollection of decided cases and of the details of testimony in causes tried before him, was the frequent subject of remark.

As a judge, he was able, intelligent, and upright in the administration of his office. His personal character in all relations was above reproach. His judicial integrity and his honor as a man and citizen were never questioned. Peculiarly social and kindly by nature and genial in intercourse, he was always an entertaining companion and by common assent accorded a prominent place in society.

While living in Madison, he was married to Electa A. Wright, of that city, a sister of David H. Wright, well known for years in political and Masonic circles. Together they made their home a center of kindly hospitality. Both of them were much interested in the industrial school of Milwaukee, and did much to promote its interests and those of other charitable enterprises. Both were for many years faithful members of St. Paul's Church in this city. A devoted and affectionate husband and father, Judge JOHNSON was also a public-spirited citizen, a warm-hearted

friend, and in all the varied relations of life worthy of the high esteem in which he was held.

To his widow we offer the consolation of our respect and sympathy in the presence of this her great bereavement.

JOSHUA STARK,
LAWRENCE W. HALSEY,
R. N. AUSTIN,
G. W. HAZLETON,
J. M. PERELES,
Committee.

Judge Noyes then said:

I have been requested by the president of the Milwaukee Bar Association to present to this court the memorial adopted by that body on the death of Judge DANIEL HARRIS JOHNSON, which occurred in Milwaukee on the 15th instant. The meeting of the bar at which this memorial was endorsed was more largely attended than any meeting within my recollection. A more genuine expression of esteem and affection for a deceased member never was expressed at a gathering of the Milwaukee bar. It will be many years before another such tribute will be paid to one of our profession.

The memorial, in brief but appropriate terms, expresses the feelings of all those who knew Judge JOHNSON intimately in his lifetime and who now sincerely mourn his demise. I need add but a word thereto in presenting it to this court.

If I were asked to name the distinguishing qualities of heart and mind of the deceased which so strongly endeared him to those who knew him, I would answer that they were his candor, his independence, and his want of malice. He spoke frankly, acted conscientiously, and harbored no feelings of revenge. No injury or ill-will ever rankled long in his forgiving heart.

The varied experiences of a long and active life, supplemented by an unusually retentive memory and by a great fondness for books, furnished him with a storehouse of knowledge of the most extensive and universal character. He was one of the best informed men at the bar. He had been a student, teacher, legislator, educator, author, lawyer, judge. Not ambitious to be famous, nor eager for riches, he took time to study, to converse, and to reflect. Thus he became a versatile writer, a fluent talker, and a learned jurist. There have doubtless been at the bar and on the bench in Wisconsin men of better judgment, of more brilliant parts, of greater talents, but none of more honest intent and deed, of wider knowledge, of greater independence, and of kinder heart. None have been more impartial, more considerate of young attorneys, more willing to admit the making of errors and to correct them when con-

vinced of the wrong. Few have lived to better purpose, and few, if any, will be more missed in social and professional life.

I beg leave to ask that the memorial submitted be spread upon the records of this court.

Mr. Chief Justice CASSODAY responded for the court:

Mr. JOHNSON was a remarkable man in many respects. He resided in the state during its entire existence. I first knew him as a member of the Assembly from Crawford county. He was the same social, entertaining, witty, and agreeable gentleman then, that he continued to be throughout life. An extensive reader, a discriminating student, with a remarkable memory, and hence a mind richly stored with much learning and useful knowledge, with a keen sense of the humorous and the ludicrous and a natural fondness for controversy, he was generally conspicuous in any circle of which he was a member. Honest in purpose, quick in perception, independent in thought, unique, original, and self-reliant, firm in conviction, open and unreserved in utterance, bold in expression, and courageous in action, he generally impressed all who saw and heard him with his sincerity of purpose and his integrity of character and his ability as a lawyer and a man. At the bar he had an extensive practice, as the records of this court attest. During his twelve and one-half years upon the bench, the mass of pressing business in his court would have overwhelmed a much younger and more cautious judge. The rapid disposition of causes at *nisi prius* necessarily precludes patient investigation and profound study. Fifty years of active service at the bar and on the bench by such a character as Judge JOHNSON was well calculated to leave a profound impression upon all who saw and heard him. But his life work is finished. May his example serve as a guide, and his memory be cherished by those who remain.

The memorial and remarks will be entered upon the records of the court.

CASES DETERMINED

AT THE

January Term, 1900.

THE STATE EX REL. CURTIS, Respondent, vs. TOWN BOARD OF THE TOWN OF GENEVA, Appellant.

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April 12 — April 27, 1900.

Highways: Establishment: Appeal from town board by nonresident freeholder: Promises of aid in construction.

1. Where an application has been made to the town board to lay out a road across the land of a citizen of this state upon whom notice thereof, making him a party to the proceedings, was given under sec. 1267, Stats. 1898, he is competent to appeal from the decision of the board thereon under sec. 1276 (providing that "any person who shall consider himself aggrieved by any order laying out" or refusing to lay out any highway may appeal therefrom), even though he is not a resident of the town.
2. Where the decision of the town board, or of commissioners, to lay out a highway was not procured or induced by private contributions or offers of pecuniary aid towards the construction of the road, such contributions do not vitiate the decision.

APPEAL from a judgment of the circuit court for Walworth county: FRANK M. FISH, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *George Lines*. They contended, *inter alia*, that only those qualified to be signers of an application for the laying out of a highway can appeal from the refusal to grant such application. In this case the relator, not being a resident of the town, was not qualified to sign a petition for the laying out of the highway in ques-

tion. Sec. 1265, Stats. 1898; *Damp v. Dane*, 29 Wis. 419; *State ex rel. Iola v. Nelson*, 57 Wis. 147.

For the respondent there was a brief by *Simmons & Tyrrel*, attorneys, and *Cooper, Simmons, Nelson & Walker*, of counsel, and oral argument by *J. B. Simmons*.

CASSODAY, C. J. On January 11, 1897, an application was made to the defendant, *The Town Board of the Town of Geneva*, in Walworth county, to lay out the highway in question. On February 20, 1897, the town board decided upon such application, and by a written order in due form by them signed and then filed with the town clerk, denied such application and refused to lay out such proposed highway. The relator, *Lewis Curtis*, who then was, and is, a citizen of the state, a freeholder in the town of Geneva, and the owner of land across which the proposed highway was to be laid, but who was a resident of the city of Lake Geneva in that county, considering himself aggrieved by the determination of the supervisors of the town, in March, 1897, duly appealed from such determination to the county judge of that county for the appointment of commissioners to review such order or determination, and executed in due form, and duly filed with the county judge, a bond to the town of Geneva, with sufficient sureties, approved by the judge, conditioned as required by the statutes of this state. Thereupon the county judge, pursuant to notice duly given by him, and in the manner prescribed by law, on April 24, 1897, at his office in Elkhorn (the relator and the town board being present and participating in the proceedings), selected E. D. Page, W. H. Aldrich, and J. W. Bronson, three disinterested freeholders of that county, as commissioners to review the order or determination of the town board in the manner provided by law, and thereupon annexed to such application a warrant, under his hand, requiring them to appear personally at the town hall in the town

of Geneva, May 3, 1897, at 10 o'clock in the forenoon of that day, to view and examine the highway described in such application, and review the order or determination appealed from, and make return of their decision thereon to the town clerk of the town of Geneva within twenty days thereafter, which warrant was duly served upon each of such commissioners.

Pursuant to such warrant the persons so chosen commissioners met at the town hall mentioned, May 3, 1897, at 10 o'clock a. m., pursuant to such warrant, and having been first duly sworn justly and impartially to discharge their duties as such commissioners, then and there proceeded to view and examine the proposed highway, and to review the determination appealed from, and heard all parties interested therein, and the proofs offered by them, and then and there decided and determined that the order or determination of the town board refusing to lay out such highway should be in all things reversed, and then and there reduced their said decision to writing, subscribed their names thereto, annexed the same to such warrant, and on May 4, 1897, duly filed such decision, together with such warrant thereto annexed, in the office of the town clerk of that town.

On October 19, 1897, the relator caused all proper papers to be filed in the office of the town clerk for the laying out of such proposed highway in conformity with the decision of such commissioners, with a written request for the laying out of such highway. Such request not being complied with, the relator, December 7, 1897, at a duly convened meeting of the town board, at which all of the supervisors were present and participating, appeared by his attorneys and made demand of the town board personally that they should comply with and carry out the decision of such commissioners reversing their order of February 20, 1897. The town board then and at all times refused and neglected to comply with the decision of such commissioners and lay out such high-

way. Thereupon, and on February 4, 1898, the relator, upon petition filed, obtained an alternative writ of *mandamus* from the trial court, requiring the town board to show cause why they should not lay out the road as determined by such commissioners. The town board made return to such alternative writ. Thereupon, and on April 8, 1898, the relator made answer to such return.

The issues thus formed having been tried by the court, the court on June 26, 1899, found as matters of fact, in effect, as stated, and as conclusions of law the court found that the relator was entitled to judgment against the defendant, *The Town Board of Geneva*, for the costs of this action, and for a peremptory writ of *mandamus* requiring and commanding the town board to proceed to lay out the proposed highway described, and ordered judgment to be entered accordingly. From the judgment so entered the town board brings this appeal.

A reversal is sought on the ground that the relator was incompetent to take the appeal from the decision of the town board. The statute applicable is to the effect that "*any person who shall consider himself aggrieved* by any order laying out" or refusing to lay out any highway "may, within thirty days after such determination, appeal therefrom and apply . . . to the county judge for the appointment of commissioners to review such order or determination." Sec. 1276, Stats. 1898. The objection is that the relator resided in the city of Lake Geneva, and not in the town of Geneva, where the proposed highway was to be located. It was found by the court, and in fact is conceded, that the relator then was, and is, a citizen of this state, and a freeholder of the town of Geneva, and the owner of eighty acres of land in that town, across which the proposed highway was to be laid out; and hence notice was accordingly served upon him, as required by the statute (sec. 1267). Such notice to such landowners was to give

them an opportunity to be heard by the town board before passing upon their property rights, and hence made them parties to the proceedings. *Austin v. Allen*, 6 Wis. 142; *State v. Langer*, 29 Wis. 68; *State v. Logue*, 73 Wis. 598. Some of the authorities seem to concede the right of such landowners to appeal, and others seem to limit the right to such landowners. *People ex rel. Ridgeway v. Cortelyou*, 36 Barb. 164; *State ex rel. Dakota Co. Comm'rs v. Barton*, 36 Minn. 145; *Kimball v. Homan*, 74 Mich. 699; *Taylor v. Comm'rs of Highways*, 88 Ill. 526; *Comm'rs of Highways v. Quinn*, 136 Ill. 604. This court has held that such landowner might "in his own name procure a review on *certiorari* of the action of the authorities in laying out such highway." *State ex rel. Wood v. Goldstucker*, 40 Wis. 124. Following the decisions of New York, from whence we borrowed the statute cited giving such right to appeal, this court has recently held, in effect, that under that statute any freeholder of the town in which such highway or proposed highway is situated, who "considers himself aggrieved" by the order or determination of the town board, may appeal therefrom, as prescribed. *State ex rel. Rogers v. Wheeler*, 97 Wis. 96. That decision is certainly broad enough to cover the case at bar. We must hold that the relator was competent and had the right to take the appeal.

Counsel seek a reversal upon another ground. It appears, and is in effect found by the court, that after the commissioners had made their decision upon such appeal, and reduced the same to writing, and had all subscribed the same, the relator and one Davidson, a freeholder of the town of Geneva, together made an undertaking, which, with such decision of the commissioners, was filed in the office of the town clerk May 4, 1897. Such undertaking recited the hearing before the commissioners; the fact that they had decided to reverse the decision of the town board; that it was then proposed to lay out the road; that the mayor and

common council of the city of Lake Geneva had pledged themselves to appropriate $400 out of the funds of that city towards defraying the expenses of such road; that the residents of that city had raised, or were about to raise, $200 more, by subscription, for the same purpose, and to be paid upon the laying out and construction of the road. Therefore, in consideration of the premises, the relator and Davidson, who executed such undertaking, thereby jointly and severally undertook and promised on the part of such city and such subscribers that they should pay to the town of Geneva, in the aggregate, $600 towards the construction of such road, upon the completion thereof in a good and workmanlike manner. But the court found that such decision of the commissioners was not procured or induced by such undertaking, or by any promise thereof, or by any of the statements, promises, or offers of pecuniary or other aid in the construction of such proposed highway. The question is whether such proposed aid by the city and the resident subscribers of the city to the amount of of $600, so guaranteed by the relator and Davidson, vitiated the decision of the commissioners.

Of course, it is well settled in this state and others that the legislature has no power to authorize private property to be taken for private use without the owner's consent, even if compensation be provided for. Sec. 13, art. I, Const.; *Osborn v. Hart*, 24 Wis. 89; *Culbertson v. Coleman*, 47 Wis. 200, 201; *State ex rel. Lightfoot v. McCabe*, 74 Wis. 483; *Wis. W. Co. v. Winans*, 85 Wis. 39, and cases there cited. We are referred to cases, on the part of the defendant, where, to avoid such rule, private parties have prevailed or attempted to prevail upon town authorities to lay out highways, colorably for the use of the public, but really for their own private benefit alone, over the land of others, without their consent, by offering to pay, or to secure the payment of, the damages, or some part thereof, for taking the

land, and where such proffered aid in such a case has been condemned. *Comm. v. Cambridge*, 7 Mass. 165–167; *Comm. v. Sawin*, 2 Pick. 547; *Dudley v. Cilley*, 5 N. H. 558. And yet in these cases, or some of them, it is, in effect, held to be no objection for the landowner to waive all claim for damages for the purpose of obtaining the road, "nor to a *bona fide* charitable donation to a town or plantation to relieve it under burthens necessarily imposed for the public benefit." In New Hampshire the courts go as far as any in the condemnation of such voluntary aid, yet even there it is held that the court would not, in the absence of proof, presume that the town authorities acted upon such inducement. *Smith v. Conway*, 17 N. H. 586, 592. In a more recent case it was held in that state that "a town may make an appropriation necessary for building a convenient public bridge, with a proviso that if enough more to enable the town to build a more convenient one, of a certain design, is contributed by individuals and given to the town, the more convenient one shall be built." *Kelley v. Kennard*, 60 N. H. 1.

In Massachusetts it was held at an early day that the taking of a bond from an individual to contribute towards the expense of laying out or altering a highway would not vitiate the proceedings, unless the bond was the basis of the proceeding, and the adjudication was not colorably for the use of the city, but really for the benefit of a private individual. *Parks v. Boston*, 8 Pick. 218. So it has been held in that state that "where a sum of money was subscribed by certain individuals for the purpose of defraying a portion of the cost of a town way, and this fact was communicated to the inhabitants of the town before the town way was approved, . . . the vote of approval was not rendered invalid thereby." *Copeland v. Packard*, 16 Pick. 217. See, also, *Blake v. County Comm'rs*, 114 Mass. 583. In a recent case it is said by that court that "there may be voluntary private contributions, reducing the amount of the public

charge, and such contributions do not invalidate the acts of the authorities charged with the duty of adjudging whether the improvement shall be made, and its details." *Atkinson v. City Council of Newton*, 169 Mass. 242. See, also, *State v. Justice*, 24 N. J. Law, 413; *Townsend v. Hoyle*, 20 Conn. 1. So, in Maine it has been held that the action of the commissioners would not be set aside "because the damages sustained by certain individuals were paid by those having a deep personal interest in the establishment of the road, and thus their releases were obtained." *In re Vassalborough*, 19 Me. 338. So, it has been held in Ohio that "undertakings by written subscription to contribute money or other property in aid of public works are valid contracts that may be enforced in courts of justice." *Comm'rs of Canal Fund v. Perry*, 5 Ohio, 58. To the same effect, *State v. Collins*, 6 Ohio, 126.

We are not aware of any ruling of this court upon the facts found by the trial court which would tend to vitiate the decision of the commissioners in this case. On the contrary, there are some decisions which sanction such voluntary aid to public improvements. *State ex rel. Park v. Sup'rs of Portage Co.* 24 Wis. 49; *State ex rel. Newell v. Purdy*, 36 Wis. 225; *Lynch v. E., L. F. & M. R. Co.* 57 Wis. 430; *Pepin Co. v. Prindle*, 61 Wis. 311, 312, and cases there cited; *Lund v. Chippewa Co.* 93 Wis. 646, 647. Of course, such contribution or offer of pecuniary aid must not be of such a character, nor made under such circumstances, as would be likely to swerve the commissioners or town board from the performance of their duty to the public. Here, as indicated, it is expressly found that the decision was not procured nor induced by the undertaking, nor by any promise of pecuniary or other aid, and we cannot say that such finding is not sustained by the evidence. Upon the reversal of the order or determination of the town board by the commissioners, the town board was required by the statute to proceed to lay

out the highway, "the same as if they had originally determined to lay out" such highway. Sec. 1282, Stats. 1898. That statute is peremptory, and the town board were bound to obey it.

By the Court.— The judgment of the circuit court is affirmed.

J. I. CASE PLOW WORKS, Respondent, vs. NILES & SCOTT COMPANY, Appellant.

April 12—April 27, 1900.

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109 245
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Sale of chattels: Warranty: Breach: Retention of property by purchaser: Absolute worthlessness: Evidence: Measure of damages: Interest.

1. In case of breach of warranty in the sale of chattels, if a comparatively small outlay will remedy the defect, the vendee is not entitled to keep the chattels and refuse to make the necessary change and recover back the entire purchase price, but he should make the change or cause it to be made, and the reasonable expense of making it will be the ordinary measure of his damages.
2. In an action to recover damages for breach of warranties in the sale of cultivator wheels, evidence that the wheels could have been made entirely serviceable and suitable for the uses intended, at a maximum cost much less than the purchase price, by knocking out the old hubs and casting or welding in new hubs, is *held* to have been uncontroverted, notwithstanding one witness testified generally that the wheels were worthless as cultivator wheels; and another testified that, at the time of the trial more than eight years after the manufacture of the wheels, when they had greatly depreciated by rust, he considered them worthless; and the court found that they were "practically useless and of no market value."
3. In actions for damages for breach of warranty, for breach of contract for the delivery of chattels, for the wrongful conversion of chattels, for the wrongful destruction of property, etc., the plaintiff, if he recovers, is entitled to interest from the time of the breach or the commission of the injury, not *as such*, but *as compensation* for the delay, and in order that he may be fully remunerated for his injury.

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Reversed.*

The plaintiff is a Wisconsin corporation, doing business at Racine, Wisconsin, and engaged in the manufacture of plows, cultivators, and other agricultural implements. The defendant is an Indiana corporation, which makes metal wheels at La Porte, Indiana.

This is an action to recover damages for an alleged breach of warranties upon the sale of certain metal wheels to be used upon cultivators and other agricultural implements, and which were purchased by the plaintiff of the defendant under a written order made August 16, 1888, and accepted by the defendant. The material parts of the order are as follows:

"You may enter our order for our season's wants on the following styles of wheels, and at the prices and terms named:

32-in. walking cultivator wheel, 1¼ rim, half oval, 8 steel or 10 iron spokes, ⅝	$ 60 each
31-in. walking cultivator wheel, 1¼ rim, half oval, 8 steel or 10 iron spokes, ⅝	59 each
32-in. sulkey wheel, 2¼ rim, half oval, 14 steel spokes, ⅝	1 00 each
24-in. wheel, 2-in. double-channel-rim, 8 steel spokes, ⅝	70 each

". . . You to guarantee the wheels against breakage in shipping, and against defects in material and workmanship. . . ."

The wheels were to be made after a peculiar style and pattern, samples of which had been previously submitted to the plaintiff, according to a patent owned by the defendant, and their peculiarity consisted in the fastening of the spokes to the hub; the spokes passing loosely through an outer hub, and resting with their ends against an inner hub or removable box, wherein the axle revolved, and where they were held in position by a nut having upon its inner surface a circular, V-shaped flange, which was screwed up on the end of the box so as to engage the flange into similar shaped notches cut into the spokes. Under the option in the order,

the plaintiff chose to have its cultivator wheels made with ten iron spokes. Under the terms of the general order above referred to, the plaintiff thereafter, and during the ensuing year, ordered from time to time cultivator and plow wheels of the defendant, and the defendant filled said orders; the wheels so ordered and shipped to the plaintiff amounting to 13,894 wheels, the contract price of which amounted to $9,718.87, all of which the plaintiff paid, except the sum of $1,793.07, which fell due August 22, 1889, and $914.28, which fell due April 15, 1890. The plaintiff claimed that all of the wheels so shipped were defective and worthless.

This action was once tried, and resulted in a judgment for the plaintiff, from which judgment both parties appealed to this court, and the judgment was reversed upon both appeals. 90 Wis. 590. Upon that appeal it was held that, under the circumstances, there was no implied warranty of suitableness of the wheels for the purpose intended; that no oral warranty made prior to the written warranty could be shown; and that any defect in the plan of the wheels was not a defect in workmanship; and, in substance, that the only warranty on which there could be recovery was an express warranty against defects in material and workmanship,—and the case was remanded for another trial. The action has now been tried again, upon the alleged breaches of warranty as to material and workmanship, and considerable new testimony was introduced upon both sides of these questions. At the close of this trial the plaintiff abandoned its claim of defective material, and rested on the claim of defective workmanship. Upon this question its testimony tended to show that the spokes were not properly notched and were not of uniform length, and that the flange upon the nut did not go down evenly upon all sides into the notches, by reason of which the wheels collapsed when in use. The action was tried before a referee, who found that 6,842 wheels were defective in the respects claimed by

the plaintiff, and that they were practically useless and of no market value, and that the contract price of said defective wheels was $4,282.40; that the plaintiff had actually paid out for freight charges to replace defective wheels, and for wheels shipped out to replace such defective wheels, the total sum of $334.68, for which the plaintiff was entitled to judgment, less the sum of $2,707.35, being the balance unpaid upon the contract price, with interest from the commencement of the action,— making the plaintiff's total recovery $2,685.90. This report was confirmed by the circuit court in all respects, except that it was modified in respect to the amount of damages, and judgment was ordered for the plaintiff for the sum of $4,543.08, less the sum of $2,707.35, balance unpaid on the contract price, together with interest on such balance from the time when it was due to the date of the commencement of the action, amounting in all to $2,852.14; leaving net balance due the plaintiff of $1,690.94, upon which sum the plaintiff was awarded interest from the date of the commencement of the action, at the legal rate, to the date of the judgment. Judgment was entered in accordance with this conclusion March 22, 1899, in favor of the plaintiff against the defendant, for the sum of $2,604.16 damages, together with costs, and from this judgment the defendant appeals.

For the appellant there was a brief by *Cooper, Simmons, Nelson & Walker*, and oral argument by *John B. Simmons*. They contended, *inter alia*, that even if the wheels as delivered were unfit for any use as wheels, if they could be made good at an expense considerably less than the contract price, the plaintiff's damages would be limited by the expenditure required for that purpose. *D. M. Osborne & Co. v. Carpenter*, 37 Minn. 331; *New York State M. M. P. Co. v. Remington*, 109 N. Y. 143; *H. Birdsall, Sons & Co. v. Carter*, 11 Neb. 143; *Miller v. Mariner's Church*, 20 Am. Dec. 345; *Bradley v. Denton*, 3 Wis. 566. The plaintiff's claim was for unliqui-

dated damages, and interest should have been allowed only from the time they were ascertained by the report of the referee. *Laycock v. Parker*, 103 Wis. 161; *Tyson v. Milwaukee*, 50 Wis. 90; *State ex rel. Sloan, Stevens & Morris v. Warner*, 55 Wis. 271; *Martin v. State*, 51 Wis. 407, 412; *Sloan v. Baird*, 12 App. Div. 481; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *McMaster v. State*, 108 N. Y. 557; *Mansfield v. N. Y. C. & H. R. R. Co.* 114 N. Y. 331; *Hooper v. Patterson*, 32 Pac. Rep. 514; *Cox v. McLaughlin*, 18 Pac. Rep. 111; *Pacific P. T. Co. v. Fleisher*, 56 Fed. Rep. 899; *Louisville G. Co. v. Hargis*, 33 S. W. Rep. 946.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence.*

WINSLOW, J. As indicated in the foregoing statement of facts, the alleged breaches of warranty, which upon the first trial of the action were several in number, were reduced upon the second trial to a single alleged breach, namely, defective workmanship; and this breach was principally confined to the claim that the spokes of the wheel were improperly and unevenly notched and were not uniform in length, and to the further claims of lack of uniformity in the perimeter of the flanges of the box and nut, and eccentricity in the screw threads upon the box. Owing to the peculiar construction of the wheel, it was apparently absolutely essential to its success that the notches near the inner end of the spokes which were to engage flanges in the box and nut should be uniform in size and in distance from the perimeter of the wheel, and that the flanges should fit evenly upon all sides into the notches. If such uniformity and evenness did not exist, and the wheels collapsed on that account, it is clear that they were defective in workmanship, because it is admitted that the plan of the wheel necessarily called for such uniformity in order to insure success. In order to substantiate its claim of defective workmanship

in this regard, the plaintiff caused nearly or quite all the wheels which the referee found to be defective to be taken apart and examined by two experts, who testified to the defective notching of the spokes, and the other defects named, and explained why such defects made the wheels unserviceable. These wheels so examined were all stored upon the plaintiff's premises, in Racine, where the case was tried; and at the commencement of the trial the plaintiff offered to allow the defendant to examine all of them, but the offer does not seem to have been accepted. We are now asked to reverse the finding of the referee and court upon these contentions, and to find that the real and only substantial difficulty with the wheels was that the spokes were made of iron instead of steel, and hence that the defendant was not responsible for the difficulty, because the plaintiff deliberately chose the iron spokes. It must be sufficient, upon this branch of the case, to say that, after examination of the evidence, we are clearly of the opinion that the evidence was entirely sufficient to support the findings of the referee and the court, and hence, upon familiar principles, they cannot be disturbed.

The next contention made by the appellant is that the alleged defective wheels were not shown or found by the court to be worthless, but that it appeared by the evidence that they possessed some value, and that hence the recovery by the plaintiff of the full value of the wheels is erroneous. The finding was that, by reason of defects in workmanship, the wheels were "practically useless and of no market value." This was based upon the testimony of two witnesses, one of whom (Mr. Wallis, the general manager of the plaintiff) testified that if the wheels, when delivered, had any value, it was, in his opinion, only that of scrap iron, and that it was doubtful on that score, because the wheels were composed partly of steel and partly of iron, and these parts would have to be separated, and that as wheels they had no value;

that he meant that the wheels were not suitable for the purposes intended and were defective to the extent that they were valueless for cultivator or plow wheels. The other testified that, in his opinion, the wheels were absolutely worthless at the time of the trial, which was eight years after the sale, but *might* be worth something for scrap iron, if cut up. On the other hand, Mr. Scott, vice president of the defendant corporation, testified that the wheels, though useless for cultivators, might have been used upon lighter machines, such as hand carts or seeders, where they would be subject to less strain, and also that they might have been made good and substantial wheels, suitable for cultivator wheels, by knocking out the old hub and casting or welding in a new hub, at an expense of twenty to twenty-five cents a wheel, and, further, that it was his recollection that the defendant made an offer to the plaintiff to take the wheels to La Porte and make this change. This testimony stands uncontradicted in the case. There was in fact no attempt to controvert it, and it must be considered as a fact that at an expense of twenty-five cents a wheel, at the most, the wheels could have been made perfect.

The rule is that in case of breach of warranty in the sale of a chattel, where the vendee keeps the property and recoups his damages in an action for the price, the vendor may recover the value of the chattel, if it has any value, notwithstanding its unfitness for the uses for which it was purchased. *Warder v. Fisher*, 48 Wis. 338. And, where a comparatively small outlay will remedy a defect, the purchaser is not entitled to keep the article, and refuse to make the necessary change, and recover the entire purchase price as for an article which is completely worthless, but he should make the change or cause it to be made; and the reasonable expense of making the change will be the ordinary measure of damages. *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449; *Birdsall v. Carter*, 11 Neb. 143. In the pres-

ent case the testimony is undisputed that the change could have been made, that the wheels would then have been entirely serviceable and suitable for the uses intended, and that the maximum cost would have been twenty-five cents per wheel. We say the testimony was undisputed, because there was no witness who attempted to deny Mr. Scott's statement that these changes could have been made, and the wheels rendered thereby serviceable; and the general statement by Mr. Wallis that the wheels were worthless as plow or cultivator wheels cannot be considered as anything more than a statement that, in the condition in which they were received, they were not suitable for those particular purposes. So the statement of the other witness for the plaintiff that he considered them worthless at the time of the trial cannot be considered as meeting Mr. Scott's testimony, for two reasons: first, because eight years had then elapsed since the sale and delivery of the wheels, and the evidence showed that they had greatly deteriorated by rust; and, second, because he referred to them, evidently, in their condition with the defective hubs and flanges, and did not attempt to deny the feasibility of the substitution of new hubs.

Looking at the finding of the referee and the court, namely, that the wheels were "practically useless and of no market value," it seems equally plain that this does not mean that they were "absolutely worthless." Therefore we feel obliged to hold that it was neither proven nor found that the wheels were worthless, but, rather, that it was proven, without dispute, that they were of some value, and, by the expenditure of twenty-five cents per wheel for new hubs, could have been made entirely serviceable wheels. Under the rules laid down in the cases above named, this sum, viz. twenty-five cents per wheel, would be the proper amount of the plaintiff's damages upon this branch of its claim, which would amount to $1,710.50 for the entire number (6,842) of

defective wheels, to which should be added the necessary freight charges and expenses of furnishing new wheels to replace defective wheels sent out to dealers by plaintiff, which were found to be $334.68; making the total amount of the plaintiff's damages $2,045.18.

Upon the subject of interest upon the plaintiff's damages, both the referee and the circuit judge were evidently in error. They allowed the plaintiff no interest, except from the date of the commencement of the action. It is true that interest, *as such*, is recoverable in actions for the recovery of money upon contract only when the claim is liquidated, or capable of liquidation by reference to reasonably certain market values, and that in such cases it runs from the time when the debtor ought to have paid the debt by the terms of the contract, or from the time fixed by law for its payment (if any such time be fixed), or, in default of either of such dates, from the time of the making of an adequate demand. Such was the holding in the recent case of *Laycock v. Parker*, 103 Wis. 161, but the principles there stated have no application here.

It is, however, quite well established by the preponderance of authority that there are cases for breach of contract, and cases sounding in tort, where the damages are wholly unliquidated, but where they may be fixed by known and reasonably certain market values or other definite standards, where interest is to be allowed from the time of the breach or the commission of the injury. In such cases interest is not allowed, *as such*, but simply *as compensation* for the delay, and in order that the plaintiff may be fully remunerated for his injury. In such cases interest is regarded, in the absence of special circumstances showing greater loss, as measuring the proper compensation for the delay which the plaintiff has suffered in waiting for the payment of his damages; the principle being that the plaintiff will not be fully compensated unless he receive, not only the value of

the thing lost, but receive it, as nearly as may be, of the date of his loss. Such cases are actions for damages for breach of warranty on the sale of chattels, actions for breach of contract for the delivery of chattels, actions for the wrongful conversion of chattels or for the wrongful destruction of property, and perhaps other actions of similar nature. *Ingram v. Rankin*, 47 Wis. 406; 1 Suth. Dam. (2d ed.), 727, § 348; Hale, Dam. 157; Perley, Interest, 92; *Richards v. Citizens N. G. Co.* 130 Pa. St. 37; *Buford v. Gould*, 35 Ala. 265; *Minneapolis H. Works v. Bonnallie*, 29 Minn. 373; *Brown v. Doyle*, 69 Minn. 543; Sedgwick, Dam. (8th ed.), § 316. We are aware that there is some confusion in some of the authorities on this question, but it seems to have arisen from failing to keep in mind the distinction between the allowance of interest *as such*, and the allowance of interest *as compensation* for delay. *Gray v. Central R. Co.* 157 N. Y. 483.

Had the plaintiff in this case paid the full contract price of the wheels, it would, in accordance with these principles, have been entitled to recover the damages resulting from the breach of warranty, viz. $2,045.18, with interest at the legal rate from the time of the delivery of the wheels; but it appearing that there was then due or about to fall due upon the purchase price the total sum of $2,707.35, which is counterclaimed for in this action, the proper rule would necessarily be to deduct the damages from that amount, leaving a balance of $661.07, for which sum, with interest at the legal rate from April 15, 1890, the defendant should have had judgment upon its counterclaim.

By the Court.— Judgment reversed, and action remanded with directions to enter judgment for the defendant as indicated in the opinion.

HILL, Clerk, etc., Appellant, vs. THE AMERICAN SURETY COMPANY, imp., Respondent.

February 3 — May 15, 1900.

107 109	19 280
107	19
112	[4]195
112	[8]372
[8]112	628
107	19
115	264

Voluntary assignments: Negligence of assignee: Degree of care: Failure to insure; Burden of proof: Evidence: Opinion as to future conduct; Breach of assignee's bond: Remedies: Abatement of actions: Waiver: Appeal: Bill of exceptions: Action at law: Directions for judgment.

1. The duty of an assignee for the benefit of creditors is that of strict obedience to all orders of the court, and, in the absence of express direction, to exercise the utmost good faith and at least ordinary care and diligence.
2. Where it is a general custom for assignees for the benefit of creditors to keep the assigned property insured, failure of an assignee to use such diligence to procure insurance as would have been exercised by an ordinarily prudent and diligent man constitutes negligence, rendering both the assignee and the sureties upon his official bond liable for any damages proved to have resulted therefrom.
3. In an action on the official bond of an assignee for the benefit of creditors, brought by a creditor to recover for loss occasioned by a failure to insure, evidence that the property was of a kind usually insured when in the hands of such assignees; that nothing in the assignment made insurance more improbable than usual; that the time to procure insurance was ample; that the value of the property justified insurance more than sufficient to have covered the creditor's claims; and that in all reasonable probability the efforts of an ordinarily diligent man would have been effectual to procure insurance exceeding such claims,— is *held* to establish plaintiff's case *prima facie*, and to cast upon the defendants the burden of showing that by due diligence the assignee could not have obtained either any insurance or enough to protect plaintiffs from the whole of their loss.
4. In such a case hypothetical questions asked insurance agents such as "Had the assignee brought you the policies at any time before the fire to get your consent to the transfer to him of the insurance, would you have given it?" and "Would your company, at any time, have written insurance on property in the hands of an assignee?" merely call for the opinion of the witness as to what his conduct would have been under circumstances which did not exist, and were therefore improper.

5. Where an assignee for the benefit of creditors had turned over the assigned property to a receiver, and had been *functus officio* for some years, and the result of the receiver's disposition of the property had been ascertained, a cause of action on the assignee's bond for negligence in the management of the assigned estate had become complete, and, under sec. 1695, Stats. 1898, could be enforced by creditors in an independent action on the bond; and the objection that there had been no formal settlement of the assignee's account, if such a settlement is a necessary preliminary step to such action, is a matter strictly in abatement, and is waived by an answer on the merits. [Whether, at every stage of the proceedings, individual creditors may maintain an action against an assignee for any act believed to be in derogation of his duty, although the same might properly become an item of charge in his general account, not determined.]
6. The objection that there had been no formal settlement of the assignee's account is not raised by a demurrer on the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that plaintiff had an adequate remedy in the voluntary assignment proceedings. [Whether such objection can be raised at all by demurrer, not determined.]
7. On appeal the supreme court is limited to the bill of exceptions for information as to the proceedings on the trial: the opinion rendered by the trial judge, the reporter's minutes, and depositions cannot be considered unless incorporated therein.
8. Upon reversal of a judgment in an action at law in which a jury trial has been waived, the supreme court is not limited to awarding a new trial as in cases tried by a jury, but, as in equity cases, may exercise the utmost freedom in directing the course to be pursued by the trial court.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

On the 22d of June, 1894, the Enger-Kress Company made a voluntary assignment to E. B. Winterhalter, its vice president, and the defendant *The American Surety Company* became surety on his assignee's bond. The company's business was the manufacture of leather goods in a factory of its own located in North Milwaukee. It had at the time of the assignment about $38,000 of fire insurance. No effort was made by the assignee to secure consent to as-

signment of these policies to him, nor was any attempt made to obtain insurance upon either plant or contents. On July 7th the factory and contents were substantially destroyed by fire. Their value was approximately $37,000. Almost immediately thereafter, at the suit of a judgment creditor, a receiver of the assignor corporation was appointed, and on July 21st the court entered an order requiring the assignee to turn over to that receiver all the assets in his hands, subject to a claim for his compensation and disbursements while it had been in his possession. This was done, no account or report of the assignee's dealings with the property having been filed, or passed on by the court. His statement of his charges for compensation and disbursements were made, and finally allowed by the court, and paid to him by the receiver. The order for this transfer was predicated on invalidity of the assignment for the reason that the bond signed by the defendant surety company did not bear the certificate required by law of surety companies.

Much evidence was given in support of a uniform custom of manufacturers to keep their property insured at and in the vicinity of Milwaukee; also of a very general custom of assignees and receivers to maintain insurance. Evidence was also offered as to the ease or difficulty with which insurance could have been procured by this assignee had he made an effort; and that most agents would not have assumed authority without submission to home offices, which would have required four or five days.

The court found that it was customary for insurance agents not to write risks on property in the hands of assignees without submitting the applications to the home offices of their companies; "but whether or not the companies would, upon investigation, approve or accept such applications so submitted, or what proportion thereof would be so approved or accepted, was not shown by the evidence." The court further found that: "If the assignee, after the

assignment, had made due and diligent effort and had taken all usual and necessary steps to procure the consent of the several insurance companies which had issued the insurance policies to the transfer to him of said policies and the insurance represented thereby, and had also made due and diligent effort and had taken all usual and necessary steps to procure other policies of insurance or new policies to be written upon said property, he would not have been able to have procured such consent, or to have kept said policies alive, or to have secured other and new or additional insurance prior to the date of said fire. No damage was sustained by said plaintiff by reason of the failure of said assignee to attempt to secure a continuance of the said existing insurance, or to attempt to procure new insurance upon said property." It was quite conclusively proved that he could, in all probability, have obtained some insurance; but neither how much, on the one hand, nor how little, on the other, is established. The court held as matter of law that the assignee was bound to insure if he could do so "readily."

The action was brought by a creditor, without an order of court, in the name of the clerk, to recover of the assignee and said surety company the amount of unpaid claims existing against said corporation,—about $23,000 and interest,—to be collected for the benefit of these creditors. Judgment was entered in favor of the defendant surety company, from which the plaintiff appeals.

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *Charles Quarles*.

For the respondent there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. H. Noyes*. They contended, *inter alia*, that an action upon the bond of an assignee cannot be maintained until after its breach has been determined by the court in the assignment proceedings. The court having acquired jurisdiction in the assign-

ment proceedings, the statute relating thereto gave exclusive power and authority to that court to try and determine all questions as to the assignee's qualifications, competency, his negligence, misapplication of funds, failure to account therefor, or any breach of duty which he may have committed with respect to the assigned estate. *Lawson v. Stacy*, 82 Wis. 303; *Marathon Co. v. Barnes*, 86 Wis. 663; *Stein v. Benedict*, 83 Wis. 603; *Case v. James*, 90 Wis. 320; *Magnus v. Sleeper*, 69 Wis. 219; *Durr v. Wildish*, 100 Wis. 411; *Sprinkle v. Wallace*, 28 Oreg. 198. There was no duty to insure. Neither the deed of assignment nor the bond required or authorized the assignee to insure or keep insured the property. The assignee must be governed throughout by the terms and provisions of the instrument of assignment, so far as they can be legally pursued. Burrill, Assignments (6th ed.), § 350; *Geisse v. Beall*, 3 Wis. 367–388; 2 Perry, Trusts, § 527; *Burr v. McEwen*, Baldw. C. C. 154; *Lovat v. Leeds*, 31 L. J. Ch. 503; Angell, Insurance (2d ed.), § 73; *De Forest v. Fulton F. Ins. Co.* 1 Hall, 84; *Insurance Co. v. Chase*, 5 Wall. 509; *Page v. Western M. & F. Ins. Co.* 19 La. 49; 1 Phillips, Insurance, 153; *Clark v. Craig*, 29 Mich. 398; *Hamm v. J. Stone & Sons L. S. Co.* 13 Tex. Civ. App. 414; *Bailey v. Gould*, 4 Y. & C. 221; *Estate of Johnson*, 11 Phila. 83.

The following opinion was filed February 27, 1900:

DODGE, J. 1. The first and fundamental question in this case is whether the defendant assignee was guilty of a breach of his official duty in refraining from effort to secure insurance on the building and stock of the manufacturing plant in his possession. Certainly no less degree of care and diligence can be permitted to an assignee than that which is imposed upon the bailee for hire or agent, namely, that of ordinary diligence,— such diligence and care as are exercised by ordinarily prudent persons under like circumstances,—

and the utmost good faith, and to that duty he should be strictly held. It has always been the policy of courts to protect those who, by force of the law, or without their consent, are represented by others in the care of their property. In the case of an assignment the body of creditors are the ones ultimately interested in the preservation and productiveness of the property; upon them falls the loss, and to them results the benefit, of the assignee's management. They cannot direct specific acts, nor, in the main, can they control that management. Hence the duty of the courts to hold the assignee to strict performance, first, of all orders which the court may make as to his conduct, and, secondly, where the court is silent, to the full measure of diligence and fidelity above suggested. Burrill, Assignments (6th ed.), § 410; Smith, Receiverships, § 109; *Litchfield v. White*, 7 N. Y. 438; *In re Dean*, 86 N. Y. 398, 400; *In re Cornell*, 110 N. Y. 351, 357. In this case it is fully proved, and, if not proved, the fact is so well within common knowledge as to justify judicial notice thereof, that ordinarily prudent men, having in possession a large manufacturing establishment such as this was shown to be, keep the same insured against loss by fire to an amount well approaching the real value. It is also proved that assignees and receivers do not customarily pursue a different course, in this respect, from others. By one witness it is said that the custom for assignees to insure is substantially universal; by another, that nine out of ten of them do insure; and by all the witnesses that the custom is general. We cannot doubt, therefore, that it is proved to have been the duty of the defendant assignee to have exercised such diligence to procure insurance upon this plant as would have been exercised by an ordinarily prudent and diligent man. In this duty he absolutely failed, confessedly. He made not the slightest effort to secure insurance, either by the assignment of existing policies or by the procuring of new ones; and

this, too, in despite of express advice and direction from his counsel. He was, then, guilty of negligence in the performance of his duties as assignee, and no reason is apparent why both he and the sureties upon his official bond should not be liable for any damages proved to have resulted therefrom.

As we approach the question of damages, some difficulty is met. It is proved that the property destroyed was worth about $37,000; that the usual amount of insurance upon such property would have been more than enough to satisfy the claims of all the creditors, which aggregate $22,385.89; and that, by reason of the absence of such insurance, the creditors are damnified to that extent. On one hand, it is contended that this showing is sufficient, *prima facie*, to entitle them to recover, and that such recovery can be defeated only by proof that due diligence on the part of the assignee would have been ineffective in procuring either any insurance or some part of the amount necessary for the protection of the creditors; and that the burden of proving this situation rests upon the defendant, who seeks to diminish the apparently natural results of his own negligence. On the other hand, it is contended that the plaintiff must establish that the creditors have actually suffered damage by reason of the negligence of the assignee, which they would not have suffered had he not been so negligent. It is urged that it cannot be said that loss to a creditor is caused by an omission on the part of the assignee of any effort to insure, unless such effort probably would have been successful; or, if successful only in part, the amount of such injury cannot be declared unless the amount of insurance obtainable is established. Unless those facts appear, it is said the injury may as well have resulted from the most diligent conduct as from the most negligent, and the negligence is not shown to be the cause of the injury,— citing *Duncan v. W. U. Tel. Co.* 87 Wis. 173; *Hartstein v. W. U. Tel. Co.* 89 Wis. 531.

In this case, as we read the record, there is no finding upon this subject, for the reason that the court adopted a wrong legal standard for the diligence required of the assignee. *Maldaner v. Smith*, 102 Wis. 30. He held that the duty to insure existed only in case insurance could be *readily* obtained, and then proceeds to find as a fact that, although the assignee had exercised due diligence, he could neither have secured assignment to him of existing policies of insurance nor the issue of others prior to the fire. We think the diligence mentioned in this finding must be understood in the light of the rule of law enunciated by the court. So understood, the court has only found that he could not "readily" have insured. This construction of the finding is made the more certain by the preceding one, where the court finds that it is not established whether any, and, if any, how much, insurance could have been obtained by forwarding applications to the home offices of the insurance companies. Certainly, when local agents have not authority to pass on a risk, or to insure it without submission to their superiors, it is not an effort in excess of ordinary diligence to request such submission.

Being without finding as to whether or not ordinary diligence would have protected plaintiff from loss in whole or in part, we must consider the evidence without the aid of the trial court's decision thereon. On the question of the burden of proof — of the extent to which the injured plaintiff must go, after proving his injury and the defendant's negligence, to establish that the negligence caused the injury *prima facie* in order to throw on the negligent defendant the burden of proving that due diligence would have been ineffectual to prevent the loss in whole or in part — there is much authority in the cases of agents, sheriffs, and others whose standard of duty is the same as that owed by an assignee, namely, the diligence of an ordinarily prudent man. Some of the textbooks and adjudications are the following: Paley, Agency

(3d Am. ed.), 20; Story, Agency, §§ 192, 222, 236, 237; Ewell's Evans, Agency, *234; Mechem, Agency, § 518; 2 Sedgwick, Damages, §§ 545, 811, 813, 817; Sutherland, Damages, § 489 *et seq.; Wilson v. Wilson*, 26 Pa. St. 394; *Folsom v. Mussey*, 10 Me. 297; *Storer v. Eaton*, 50 Me. 219; *Strong v. High* (La.), 38 Am. Dec. 195; *Chenowith v. Dickinson*, 8 B. Mon. 156; *Beardsley v. Davis*, 52 Barb. 159; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320; *S. C.* 89 N. Y. 412; *Talcott v. Cowdry*, 39 N. Y. Supp. 1076; *Commercial Bank v. Red River Val. Nat. Bank* (N. D.), 79 N. W. Rep. 859, 866; *Heater v. Pearce* (Neb.), 81 N. W. Rep. 615; *Backus v. Ames* (Minn.), 81 N. W. Rep. 766.

Under the most liberal of the rules justified by these authorities as to the quantum of proof necessary to connect defendant's negligence with plaintiff's loss in the first instance, we are satisfied that in the present case enough was proved by the plaintiff to establish a *prima facie* liability of the defendants for the amount claimed. The insurability of the property, so far as the physical risk went, was established beyond controversy; also the practical universality of experience of assignees to obtain insurance to eighty per cent. or more of the value of property in their hands, which would have exceeded plaintiff's claims. Further, those circumstances were shown to exist which the insurance experts testified were considered as reducing to the utmost the moral hazard attending all property *in custodia legis*, and facilitating insurance thereof, namely, the productiveness of the property, the absence of protracted or antagonistic litigation, and its continued occupation by the old owners with intent to operate, and expectation to save, the plant after satisfying the creditors, and to continue business. It was also proved by a preponderance of the evidence that *some* insurance could, within four or five days from date of application, have been obtained from at least three of the companies holding policies at the time of the failure; also that, if local

agents were unwilling to assume the authority, a decision could have been had from the general offices of the insurance companies within four or five days. To summarize: The property was of a kind usually insured, and that, too, in the hands of an assignee. Nothing in this assignment made insurance more improbable than usual. The time was ample, and the value justified insurance more than sufficient to have covered plaintiff's claims. In all reasonable probability the efforts of an ordinarily diligent man would have been effectual to procure insurance exceeding $23,000. That suffices to establish plaintiff's case under the authorities above cited. Such *prima facie* case having been established, the burden of proof was on the defendants to establish, either that the assignee's negligence was not injurious at all, or, if at all, for what part of the loss *prima facie* resulting therefrom; either that by due diligence he could not have obtained any insurance, or not enough to protect plaintiff from the whole of the loss.

We incline to the view that the present record does not disclose evidence to overcome the *prima facie* liability established, but, as has already been pointed out, we consider that there is no finding on the question, and we apprehend that injustice might be done in the attempt to finally decide it here. We think it safer, therefore, that the circuit court, in the light of the foregoing statement of the diligence required of the assignee, and in view of the burden of proof resting upon the defendant, should consider and decide, upon the competent evidence already received and such additional evidence as may be offered upon the single question, whether the assignee's negligence in making no efforts to obtain any insurance caused less injury to the plaintiff than the amount of the unpaid claims, and, if so, how much less. Under all of the authorities, plaintiff is entitled to recover at least nominal damages. *Heater v. Pearce* (Neb.), 81 N. W. Rep. 615.

2. Certain errors are assigned on the admission of evidence in response to hypothetical questions. While such error would not, under the rules laid down by this court, work a reversal, yet as the admissibility and competency of the evidence so admitted, and very possibly of further like evidence to be offered, is important in the consideration of the single question to be decided by the circuit court, those assignments of error should receive attention. The objection raised was to questions of which the two following are typical: A fire insurance agent, produced by the defendant, was asked, "Had Mr. Winterhalter brought you these three policies at any time before the fire, to get your consent to the transfer to him of this insurance, would you have given it?" Question to the secretary of another insurance company: "Would your company, at that time, have written insurance on property in the hands of an assignee?" Both questions, and many others substantially similar to other witnesses, were answered in the negative. These questions fall squarely within the rule laid down in *Woodworth v. Mills*, 61 Wis. 44, 54, and *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297, 303, where they were condemned as calling merely for the opinion of the witness as to what his conduct would have been under circumstances which did not exist,— a field altogether too vague for opinion evidence. The probable conduct of a particular individual or corporation is not a subject of expert evidence; it is a subject for the jury or court, in trying the facts, to reach a conclusion on from the general custom, if any, of persons in that trade, profession, or business under like circumstances. The opinion of one as to what he would have done, formed after the event, and after he has discovered whether the act would have proved beneficial or injurious, is too unsafe and unreliable to be received as evidence. The responses to questions like those quoted above, where they were objected to,

should not have been received, and should not be allowed to have weight in the further consideration of the case.

3. It is contended that appellant cannot maintain this action on the assignee's bond until the court having supervision of the assignment proceedings shall have settled a final account and closed the proceedings. The general question is controlled by sec. 1695, Stats. 1898, which provides: "Such bond shall, immediately after its execution, together with a full and true copy of such assignment, be filed by the officer taking the same in the office of the clerk of the circuit court to whom it is executed; and the taking and filing of said bond by said court commissioner or county judge shall be deemed a sufficient approval thereof, and all bonds so taken and filed are hereby declared to be sufficiently approved. Such bond and copy of assignment shall be kept by such clerk in his office, subject at all times to the inspection of all parties interested; and any creditor of the assignor may maintain an action thereon in the name of the obligee at any time for condition broken, and any judgment rendered thereon shall be held and collected for the benefit of the respective creditors of the assignor according to law and the terms and conditions of such assignment. The court may, from time to time, require the assignee to furnish a new or additional bond." This statute is very comprehensive in its terms, but in the present case it is not necessary to decide whether, at every stage of the proceedings, individual creditors may maintain an action against an assignee for any act believed to be in derogation of his duty, although the same may well become an item of charge in his general account. Here we have the assignment entirely closed up, the property turned over by the assignee, and he for some years *functus officio* except for the single act of making the creditors good for the injury imposed on them by his negligence. One essential element of their damage could not

be known until the result of the receiver's disposition of the property was ascertained. That being done, all the elements of their case are capable of trial and decision in an action on the bond. Their cause of action is complete. That being so, if it were conceded that the formal settlement of the assignee's account were a necessary preliminary to the commencement of this action, the absence of such step would be matter merely in abatement. It would go not to defeat the cause, but to postpone the commencement of the action, and must, therefore, be raised by plea in abatement. The answer on the merits waived it. *Lombard v. McMillan*, 95 Wis. 627, 635.

By the Court.— Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

On a motion for a rehearing counsel for the respondent contended, *inter alia*, that the action is not maintainable. The objection that there had been no formal settlement of the assignee's account was raised by the demurrer. Such objection could be as well raised by demurrer as by plea in abatement. *Lombard v. McMillan*, 95 Wis. 627–635, and authorities cited; *Bigelow v. Washburn*, 98 Wis. 556; *Webber v. Ward*, 94 Wis. 605; *Hooker v. Brandon*, 75 Wis. 8–12. The complaint alleged that, although the assignee turned over certain assets to the receiver in pursuance of the order of the court and received his fees and disbursements up to that date, "said assignee had never been discharged nor have his accounts and doings ever been finally allowed or confirmed by the said court." The respondent demurred to said complaint on the ground (1) that it did not state facts sufficient to constitute a cause of action; (2) that said plaintiff had an adequate remedy at law; (3) that said plaintiff had not the legal capacity to maintain the action; and (4) that said plaintiff had an adequate and exclusive remedy in the

voluntary assignment proceedings set forth in the complaint. The demurrer was overruled and respondent excepted. This raised the question whether the action on the bond could be maintained, the assignee never having been discharged.

The following opinion was filed May 15, 1900:

DODGE, J. 1. The respondent's argument upon motion for rehearing, while quite extended, presents nothing from the record which was not observed and fully considered by this court as bearing upon the facts of the case. The quotations from some opinion said to have been rendered by the circuit judge and from reporter's minutes and depositions can hardly be urged upon our attention seriously by the counsel. However great our confidence in him personally, the law does not permit us to accept his assertions to establish the proceedings at the trial. We are confined to the bill of exceptions for information on that subject. Were we permitted to inform ourselves from the "opinion" as to the mental processes of the circuit judge, the error involved in the judgment would be only the more apparent, for we should discover that he found the defendant assignee negligent as a matter of fact, and that he did not find as fact either that the old insurance could not have been renewed to the assignee, or that he could not have obtained other insurance, but merely that there was no preponderance of evidence to the affirmative of these propositions. Such a finding would not have supported judgment for defendant in the light of the rule as to the *onus probandi* adopted in our original decision, and since then more elaborated in *Hildebrand v. Carroll*, 106 Wis. 324. If the views expressed in that opinion persisted, the findings must have been signed without consideration, for they differ widely, in that they ignore the direction to declare the defendant assignee's negligence, and do declare the negative where

they were directed only to express absence of preponderance of evidence to support the affirmative as to possibility of procuring insurance by due diligence.

2. Counsel complains of the grounds on which we disposed of matter urged in abatement of the action, insisting that the demurrer, allowed to be filed after once answering, did raise the objection which we held to have been waived by silence. In thus insisting he apparently confuses two very distinct things. The demurrer alleged as one of its grounds that plaintiff had an adequate and exclusive remedy in the voluntary assignment proceedings. This objection, going, as it would, to the maintenance of any independent action upon the bond, at least while the assignment proceedings are open and pending, we considered and now consider so obviously disposed of by the statute (sec. 1695, Stats. 1898) expressly authorizing independent actions that no discussion further than citation of the statute is necessary. *Boland v. Benson*, 50 Wis. 225. A further objection was urged by respondent's counsel for that, although the assignment proceedings might not be the exclusive forum for the remedy upon the bond, yet that independent action thereon could not be maintained "until after its breach had been determined by the court in the assignment proceedings." This objection, strictly in abatement, was not raised by the demurrer; indeed, it is difficult to see how it could have been, for the statute (sec. 2649) authorizes no such ground; nor was it raised by plea in abatement. To this latter objection was addressed the conclusion of waiver in the former opinion.

3. Counsel for respondent assails the power of this court, upon reversal of a judgment in an action at law, to remand with directions for a partial new trial, citing to us rulings made with reference to jury trials. In such cases the rule is without doubt. Rule XXXII. In dealing with appeals

from judgments rendered upon trials by the court or a referee, however, this court has always exercised the utmost freedom in directing the course of the court below after reversal. *Lemke v. Daegling*, 52 Wis. 500; *Braunsdorf v. Fellner*, 76 Wis. 1; *Patten P. Co. v. Green Bay & M. C. Co.* 93 Wis. 283; *Menz v. Beebe*, 102 Wis. 350; *Gilbert v. Pier*, 102 Wis. 334, 338; *Johnson v. Huber*, 106 Wis. 282. The distinction results from the inability of this court to decide questions of fact in the former class of cases, which does not at all apply to the latter. Indeed, express authority therefor is given by sec. 3070, Stats. 1898. No distinction whatever exists between judgments in suits in equity and in actions at law, where right to jury trial has been waived, as to the manner of consideration, or the form or extent of their correction on appeal. By sec. 3071 we are, by legislation, empowered to reverse in whole or in part, to affirm, or to modify; and the custom has been general to apply the law to the facts as they appear to us, and direct the court below as to its judgment or other further proceeding. Whether the power so to do results from the statute, or from the constitutional devolution of appellate jurisdiction or of general superintending control over inferior courts, is, perhaps, not very material. Its existence, derived from some or all of those sources, cannot, at this late day, be questioned. The policy of this court is, generally speaking, to terminate litigation; to finally conclude, either by affirmance or direction, all issues which have been regularly tried and properly brought before us; and to remand issues for retrial only when necessary to sure and complete justice, yielding, as every policy must, to the constitutional assurance of the right to trial by jury in certain situations. We have no doubt of the existence of the power exercised, nor of the wisdom of the policy adopted, in the judgment rendered in the present case.

We find nothing in respondent's argument meriting further consideration or discussion than was devoted to it upon the original hearing of the appeal.

By the Court.—Motion for rehearing denied, with $25 costs.

SMITH, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 5 — May 15, 1900.

Railroads: Personal injury: Court and jury: Special verdict: Splitting up damages: Appeal: New trial.

1. In an action for personal injuries received in a railway collision, a physician who examined the plaintiff about six months after the injury, with a view to testifying on the trial, testified that he then discovered a displacement of the semilunar cartilage of the left knee and replaced it, but did not disclose the fact to the family physician although the latter was present at part of the examination. No symptoms of any such displacement were discovered, either by the same physician upon both prior and subsequent examinations, or by plaintiff's family physician who examined her repeatedly and attended her to the time of the trial, and no reference thereto was made in the complaint unless under a general allegation that plaintiff was "otherwise injured." It was admitted that a person could not walk or stand upon a limb during such a displacement, and that plaintiff walked without assistance immediately after the accident and from time to time thereafter. *Held*, that a finding of the special verdict that said cartilage was displaced by the collision was unsupported by the evidence, especially in view of the testimony of all the other medical experts that upon the admitted facts there could have been no displacement by the accident.
2. In an action for personal injuries the jury by a special verdict awarded plaintiff $4,000 for displacement of the semilunar cartilage, $200 for impairment of hearing, and fixed her damages generally at $5,000. On appeal the evidence was held insufficient to sustain a recovery for the displacement of said cartilage. *Held*, that a new trial would not be granted, but the judgment would be affirmed except as to the damages awarded for such displacement.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed in part; reversed in part.*

For the appellant there were briefs by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *John T. Fish.*

J. C. Kerwin, for the respondent.

The following opinion was filed March 20, 1900:

CASSODAY, C. J. This action was commenced September 21, 1897, to recover damages for personal injuries sustained by the plaintiff on the night of June 29, 1897, at West Chicago, while riding as a passenger for hire on the sleeping car at the rear end of the train running from Chicago to Omaha, by reason of the negligence of the defendant. The defendant's answer admitted that one of its employees, through inadvertence and mistake, failed to observe a well-known signal, and by reason thereof that train, while standing upon the track, was collided with and run into by another of the defendant's trains coming upon the same track from the rear, and took issue only with the allegations of the complaint as to whether the plaintiff sustained any injuries, and, if so, the extent of such injuries.

At the close of the trial, the jury returned a special verdict to the effect (1) that the plaintiff was injured by the collision mentioned; (2) that the semilunar cartilage on the inside of her left knee was displaced by the accident; (3) that she also sustained injury which caused an impairment of her hearing in her left ear; (4) that she did not receive any injury which caused heart disease; (5) that they awarded damages to the plaintiff for such injury of displacing the semilunar cartilage on the inside of her left knee to the amount of $4,000; (6) that they awarded damages to the plaintiff for such impairment of her hearing to the amount of $200; (8) that the plaintiff had sustained damages by reason of her injuries to the amount of $5,000.

Thereupon the defendant moved the court, upon the undisputed evidence, to amend such special verdict by striking out the answer of the jury to the second and fifth questions, upon the grounds that they are contrary to the law and evidence, and are not supported by the evidence, and to change the answer of the jury to the eighth question, so that it will read $1,000, in order to conform to the verdict of the jury as thus amended, and with the undisputed evidence, which motion was denied, and the defendant then and there excepted. The court also refused to set aside the verdict and grant a new trial, and ordered judgment to be entered in favor of the plaintiff, and against the defendant, for $5,000 damages and costs, making in all $5,112. From the judgment so entered the defendant brings this appeal.

The defendant makes no serious objection to so much of the special verdict as awarded to the plaintiff $1,000 damages; that is to say, $200 damages for impairment of her hearing, and $800 for other damages, exclusive of the $4,000 awarded by reason of the displacement of the semilunar cartilage on the inside of her left knee. But the defendant contends that the complaint fails to allege, and the evidence fails to establish, any such displacement of the semilunar cartilage. The portion of the complaint alleging the injury reads as follows: "That, by reason of such collision, . . . the plaintiff . . . was thrown with great force and violence upon the seats or partitions between the seats in said sleeping car, and one of the upper berths of the said car was violently detached from its position in said car, and hurled with great force and violence against the person of the said plaintiff, striking her upon the left side of her head and ear, and throwing her with great force against the seats or floor of said car, pinning her to the seat by reason of the great weight of said upper berth, and that, by reason of the force of such blow, occasioned by the said collision, the said plaintiff received severe bruises upon the left side of her head, and

serious and permanent injury to her left ear, so that the hearing thereof has been destroyed; that she received a permanent injury to one of the bones of her left thigh, from the consequences of which she has suffered great pain and inconvenience, and is yet unable to use the said limb as before, and has become lame and disabled therein, and permanently deprived of the full or former use of said limb; that plaintiff also suffered severe bruises upon her right side and back, and to her left arm, *and was otherwise injured in and about her person, particularly in the region of the head and neck, and was especially injured in her spinal cord in the region of the head and neck*, to such an extent that she is advised and believes she will never entirely recover therefrom; . . . that the shock of the impending danger was such that she was unable to move or take any steps for her own safety, and this shock, together with that occasioned by the pain from the subsequent injuries, and the fear caused by the knowledge of the impending collision, all so shocked and injured her entire nervous system and brain that, as she is advised and believes, there is permanent and serious damage done thereto, and that she will never wholly recover therefrom; that in consequence of the said injuries this plaintiff suffered at the time extreme, continuous, physical pain, and became immediately unconscious from the effects of such collision and injuries; that, upon regaining consciousness, the continued, excessive pain brought on another term of unconsciousness, and the pain and tortures aforesaid continued with great severity, and still continue, so that the plaintiff is almost wholly deprived of the power to perform her household duties, and is entirely deprived of the power to enjoy life as heretofore, the shock to her nervous system being such that she has become irritable, and is easily annoyed, and has become greatly depressed; suffers from frequent headaches, and from constant pain, both in her limb and head; from the loss of hearing in her left ear; from an

unduly active and rapid, tumultuous pulse; and has since said injuries, at very frequent intervals, been subjected to the discomfort and danger of a serious heart trouble, which plaintiff is advised and believes is permanent, and extremely dangerous to her health and life."

It is undisputed that the plaintiff was twenty-seven years of age at the time of the accident; that in the year 1895-96 she was treated by her physician for heart trouble; that he pronounced her well some time before the accident; that for a year prior to the accident she did her own work; that she and her grandmother took passage on the defendant's train at Neenah, June 29, 1897, for California, as members of the Christian Endeavor excursion; that a week prior to starting, at the suggestion of her husband, she was examined by a physician to see if she was well enough to go; that the collision occurred about 1 o'clock a. m.; that at the time of the collision she became unconscious; that soon after the collision she found herself on the bank outside of the car; that she thereupon walked, without assistance, to the station near, but that it was almost impossible to do so, and she fainted while there; that she and her grandmother remained at the station until nearly 4 o'clock a. m., and while there a physician bandaged her knee, and gave her a bottle of brandy, and the plaintiff telegraphed her husband that they were all right, and would go on; that about 4 a. m. they took a train provided, and continued their journey west; that such passengers as were very seriously injured were removed to a certain hotel, while those less seriously injured were removed to another hotel; that the plaintiff so continued the journey because she thought she would get over her injuries right away; that she got the next treatment at Boone, Iowa, where a physician came upon the train at that place, and bandaged her knee, and ordered hot-water applications to be furnished every fifty miles; that she continued such applications until she reached Stockton,

California; that she was there treated by a physician, who prescribed a liniment and bandage for her knee and side, and that she bandaged her knee herself; that while in California she visited with people there, went around down town, took the street cars, did not walk very much, was only able to walk a certain distance, and suffered a great deal of pain from her head and side and knee; that the pain lasted six weeks; that it was hard for her to breathe by reason of her heart, which would beat rapidly and irregularly, and she was troubled with suffocation; that she had a great deal of pain in her head,—on the left side, back of her ear and neck; that she was unable to straighten her leg, or to close it more than at right angles; that her lameness grew worse, and the leg ached severely after walking; that in going to California she got off the car for meals at Cedar Rapids, Denver, Leadville, and other places; that at San Francisco she walked three or four blocks, and then took a boat for Stockton, and remained there, or near there, with relations, about four weeks; that she was at Monterey, California; that she remained in California almost as long as she intended when she left home,—lacked only two or three days; that she started home from California August 7, 1897, and came by the Northern Pacific Railway, and by the way of Portland, Oregon; that she reached Neenah, August 13, 1897; that after reaching home she attended the minstrels upstairs at the Opera House, about six blocks from her home, and did not remember whether she rode or walked; that she also went to the office of her family physician for examination and treatment; that he prescribed liniment and a rubber bandage for her knee, a prescription for her head and ear, and also for her nervousness and her heart, which she used; that she had another physician at the house to see how bad her injuries were, but he did not prescribe.

Dr. Ritchie, the plaintiff's family physician, testified in behalf of the plaintiff to the effect that she called upon him

about August 19, 1897, and he examined her, and measured her two knees, and found but little, if any, difference in their size; that she could bring her left knee to a right angle, and perhaps a little more, but could not straighten it into about five degrees, and then it would give her pain; that he did not then think that the knee would result seriously, and advised her to use it by walking; that the injury was a sprain, accompanied by other trouble; that he thought the surface of the articulatory bones were injured, but that there had been no fracture of the bone; that the cartilage between the bones is not always injured by a sprain; that a tearing of the ligaments may allow one bone to slip past the other without injury to the cartilage,—the cartilages move on themselves, without friction; that there was no evidence of injury to the muscles; that a sprain in the joint may or may not affect the position of the cartilage; that by keeping the leg straight, and reducing the inflammation, the cartilage may become normal; that he found tenderness over the inside of the large bone of the knee, with some discoloration and tenderness on the anterior surface of the leg, and below the kneepan, and just under the kneepan in front; that such discoloration was less than it had been, and was then fading, and within four or six weeks entirely disappeared; that she walked lame; that he found no anatomical lesion, and no injury to the drum of the ear; that he examined her again a week after, but found no marked difference, except less discoloration; that his visits in attending her were somewhat irregular,—would average, perhaps, once a week; that he consulted Dr. Gill in January, 1898, in regard to the injuries and a change of treatment; that they concluded to put the knee in a plaster cast or bandage, so as to prevent the joint from acting, and did; that after about three weeks he took it off, and after a day or so put it on again for three weeks longer, but there was not much perceptible change, except the knee was a little stiffer for a short time.

Dr. Gill testified, in behalf of the plaintiff, that he first examined her at the request of her attorney, and with a view of giving testimony in the suit which was about to be brought, September 12, 1897, and subsequently, at the request of her husband, January 3, 1898, and May 4, 1898; that he spent three or four hours in examining her, September 12, 1897; that he measured both of her knees, and found the left one eighth of an inch smaller; that she could only bend her left leg at about right angles, and could not quite straighten it; that there was tenderness about the knee joint, both at the upper end of the lower larger bone and the upper bone, but there was no swelling of the knee joint at that time; that the tendons reflex was present in a normal degree at that time, and she limped when she walked; that he next examined her for three or four hours on January 3, 1898; that, upon manipulating the knee, he found it was less free in its action than it had been; that immediately above the upper end of the lower bone he found a slight projection; that by pressing upon it it slipped back into its natural position; that the part so displaced was known as the cartilage in the joint of the knee,— called the semilunar cartilage; that there was more tenderness than at any time before or afterwards, but there was practically no difference in the circumference of the knee; that the effect of loosening the cartilage is that it becomes displaced, and the joint catches, and the injury is permanent; that he discovered nothing of the kind when he examined the knee, September 12, 1897, but that it might have been loose at that time, without being projected; that a physician might examine it a dozen times without finding it; that when it slips out or protrudes it may be found, but not at other times; that Dr. Ritchie was there during a part of that examination, but that he kept still about it, and did not mention it to Dr. Ritchie; that he found nothing of the kind when he examined the plaintiff for three or four hours on

May 4, 1898, nor when he examined her a few days before the trial, which occurred September 2, 1898; that, in case of injured tissue, the semilunary cartilage may be displaced by relaxation of the ligaments of the knee, not in a healthy knee without a separation or stretching of the ligaments, and without tearing it, but that he never knew of such a case in his practice, and never saw such a case, except one that he cut down; that no immediate effect follows such displacement,—sometimes for a few moments the knee is perfectly natural, then swelling follows shortly afterwards; that it is often true, as stated in a standard text-book of surgery, that displacement "may occur in health, the coronary ligament being torn away; the symptoms are sudden and severe pain, with inability to stand or walk, the leg being partially flexed and the joint locked,"— but he did not think it would apply in every case; that it might become displaced, and immediately become replaced, without the person knowing what had occurred; that he found no evidence of floating cartilage at any time; that sometimes there are hysterical joints, which deceive the most practiced physicians; that the plaintiff could not have walked at all at any time when the semilunar cartilage was displaced; that the semilunar cartilage, when so displaced, protruded perhaps one fourth or three eighths or one half an inch.

The physician who attended the plaintiff at Boone, Iowa, testified to the effect that he found a contusion above the left knee, and in front,—a discoloration of the skin, with a slight swelling about the knee; that there was no trouble in straightening the limb or flexing it, except she said it caused her slight pain; that he observed varicose veins in her limbs; that he prescribed bandage and hot water bag to be used on the train; that, as a rule, the semilunar cartilage is not displaced without a rupture of the ligaments; that, in case of unnatural displacement, the patient cannot stand upon the foot or walk.

Dr. Sifton testified to the effect that the semilunar cartilage could not be displaced unnaturally without tearing the ligaments; that if the ligaments were ruptured, and it got out of place, the joint would swell very quickly, and it would be a very serious injury to the joint, and it could not be used at all, and a person could not walk or stand upon it while displaced; that after it had been displaced and replaced there would be soreness until the ligaments healed, and then it would usually be well again; and, in answer to hypothetical questions covering the admitted facts, he testified, in effect, that there was no evidence of displacement of the semilunar cartilage.

Dr. Steel testified to the effect that he examined the plaintiff's knee and heart four or five days before the trial; that the plaintiff complained of no tenderness whatever at the edge of the semilunar cartilage or about the head of the tibia; that he could discover no evidence whatever from the examination of the knee that the semilunar cartilage had ever been displaced, nor of any tearing or rupture of any of the ligaments of the knee joint; that the semilunar cartilage could not be thrown out three fourths of an inch beyond its normal position without rupturing the coronary fibers that hold it; that in its normal condition it had a slight movement, the coronary ligaments being sufficiently loose to permit such movement; that he discovered no evidence that there had been any rupture of any of the fastenings, nor that the bones were bruised or diseased in any way, nor that there had been any fracture of any portion of the bone; that some displacement of the semilunar cartilage might come from a wrench; that, if it was at all serious, there would be more or less inflammation; that it is one of the most marked symptoms of displacement that the leg is fixed in a flexed condition, so that it cannot be straightened until it is put back; that there could be no displacement by an accident where the person walked immediately after the accident.

He answered the hypothetical question the same as Dr. Sifton.

Drs. Corbett and Roose gave similar testimony

We have thus given the general outlines of the evidence bearing upon the question of the displacement of the semilunar cartilage of the knee in question. It is overwhelmingly established, and practically admitted, that the plaintiff could not walk or stand upon that limb at any time during such displacement. It stands admitted that, as soon as the plaintiff got over the shock of the accident, she walked, unassisted, for a considerable distance to the depot; that she repeatedly walked from the car to the eating houses along the route to California; that in San Francisco she walked several blocks to the boat; that at Stockton and vicinity, in that state, she walked repeatedly; that, after being absent from home a month and a half, she returned by way of Oregon and the Northern Pacific; that after returning home she from time to time walked several blocks; that the action was not commenced until five weeks after her return home, during which time she had been examined between three and four hours by Dr. Gill, and repeatedly examined by her family physician, with the view of testifying as to her condition upon the trial of the action; that neither of them claims to have discovered any symptom of such displacement at any of such examinations; that no reference to any such displacement is found in the complaint, notwithstanding there are numerous items of damages alleged; that it is only claimed to be covered by the clause, "otherwise injured in and about her person, particularly in the region of the head and neck," and especially in the spinal cord in the region of the head and neck; that the family physician continued to attend her for more than a year, and down to the time of the trial, without ever at any time having discovered any evidence of such displacement; that he was present at a part of the ex-

amination of the plaintiff by Dr. Gill, January 3, 1898, and which was more than six months after the accident; that Dr. Gill testified that at that time, while manipulating the knee, he discovered such displacement and replacement, but never disclosed the fact to such family physician until the trial; that he saw no evidence of such displacement when he subsequently examined her in May, nor just before the trial in September, 1898.

In our judgment, the finding of the jury that the semilunar cartilage of the plaintiff's left knee was displaced by the accident is not sustained by the evidence, especially in view of the testimony of the other medical experts that, upon the admitted facts, there could have been no such displacement by the accident. If there was a displacement and replacement January 3, 1898, as stated, still the cause of it is purely conjectural, especially as nothing of the kind was ever known to exist, before or since, down to the time of the trial. We must hold that such finding of the jury was contrary to the undisputed evidence. The refusal of the court to so charge the jury was error. So the submission of that question to the jury was error. So it was error to refuse to set aside the answers of the jury to the second and fifth questions submitted, and to modify their answer to the eighth question accordingly.

Counsel for the plaintiff asked that in case we should so hold then that we should grant a new trial; that, by reason of the special verdict splitting up the damages, the plaintiff had not recovered as much for other damages as she otherwise would. Of course, a trial court might abuse its discretion by so splitting up the damages as to confuse and mislead the jury, but we do not think it was done in this case. The eighth question gave the jury plenty of opportunity to find general damages, not particularized. In view of the seeming doubt as to the right to recover damages, upon the evi-

dence, for displacement of the semilunar cartilage, the court very wisely submitted that question separately. We perceive no good reason for granting a new trial.

By the Court.—That part of the judgment based upon the finding of $4,000 damages for displacement of the semilunar cartilage is reversed, and the balance of the judgment is affirmed. No costs are allowed to either party, except the plaintiff must pay the fees of the clerk of this court.

The plaintiff moved for a rehearing, and the motion was denied May 15, 1900.

WELSHER, Respondent, vs. LIBBY, MCNEIL & LIBBY, Appellant.

April 27—May 15, 1900.

Offsetting judgments of different courts: Conclusiveness of judgment: Pendency of another action.

1. The fact that judgments are in different courts will not prevent their being offset, if the applicant applies to the court where the judgment against him exists, since such court may make the satisfaction of its own judgment conditional upon the satisfaction by the applicant of the judgment in his favor in the other court.
2. Where a judgment has not been appealed from or attacked within the time limited therefor, it must be given conclusive effect on an application to set it off against the judgment in another action between the same parties.
3. The fact that a plaintiff against whom a judgment for costs has been rendered has commenced another action against the defendant for a larger amount will not prevent said judgment being offset against a judgment in favor of the defendant, since the latter judgment would be a proper setoff or counterclaim against such demand as the plaintiff holds against the defendant.

MOTION to set off judgments. *Motion granted.*

Motion to set off judgment in this court for costs in favor of plaintiff against a larger judgment in another suit in the

circuit court for Dane county in favor of the defendant. The plaintiff is insolvent. The only objection is that plaintiff has commenced a suit against defendant for an amount larger than their judgment, in which he is advised and believes that he has a good cause of action. His attorneys do not expressly make any claim for lien upon the judgment in this court, nor suggest insolvency of the defendants.

For the motion there was a brief by *Buell & Hanks*, and oral argument by *C. E. Buell.*

F. K. Shuttleworth, contra.

DODGE, J. The policy of courts to set off mutual judgments held in the same rights between the same parties is well established in the absence of countervailing rights or equities, as recognized in *Taylor v. Williams*, 14 Wis. 155; *Bosworth v. Tallman*, 66 Wis. 533; *Lundgreen v. Stratton*, 79 Wis. 227; *Gauche v. Milbrath*, 105 Wis. 355. In the present case the personal ownership of a judgment in this court in favor of the plaintiff, and the existence of a larger judgment in favor of defendant in the circuit court, is made to appear. It is not suggested by plaintiff that any third persons, attorneys or otherwise, have acquired rights or have any equities in either of those judgments to be disturbed by offsetting them. The only objections offered are: first, that the judgment in favor of the defendant in the circuit court was inequitable and unjust; and, secondly, that the plaintiff has commenced another suit for a larger amount against defendant. The first objection is readily disposed of by the consideration that the judgment in favor of defendant must be given conclusive effect, it not having been appealed from nor attacked, and having attained an age precluding its modification by either method. The latter is not an objection, for, even though plaintiff should recover in that action, the offset now requested would serve only to diminish the judgment held by defendant, which would doubtless be a

proper offset or counterclaim against such demand as the plaintiff holds. We therefore think this is a proper case in which to apply the one demand against the other.

Where the judgments are in different courts, all difficulty in accomplishing the practical result is obviated if, as in the present instance, the party desiring the setoff makes his application in the court where the judgment exists *against* him; for the court can then make its action in satisfying, either in whole or in part, its own judgment, conditioned upon such applicant making reciprocal satisfaction of the judgment in his favor standing in another court. This principle was recognized in *Taylor v. Williams*, *supra*, where substantially the same situation was presented as in the present case.

The motion, therefore, should be granted, and the clerk directed to satisfy the judgment of this court in favor of the plaintiff upon production to him of a certificate from the clerk of the circuit court for Dane county that partial satisfaction of the judgment in favor of defendant and against the plaintiff in that court to the amount of the judgment in this court has been entered.

By the Court.—So ordered.

ERICKSON, Respondent, vs. MCGEEHAN CONSTRUCTION COMPANY, Appellant.

April 7 — May 15, 1900.

(1) *Reference: Setting aside findings.* (2) *Money had and received.*

1. Where there is ample evidence to support a referee's findings of fact, and no clear preponderance against them, the trial court is not justified in setting them aside.
2. Defendant sublet the construction of certain roadbed to D. under a contract authorizing it to pay D.'s employees and deduct such

payments from the amount payable to him. D. employed plaintiff to run a boarding camp and store. Defendant paid D.'s employees on monthly pay rolls furnished by him, deducting the amount of advances charged to each man including board, etc., furnished by plaintiff, but there was no contract made by defendant with plaintiff, or with D. for his benefit, that it would reserve the amount due plaintiff from D.'s employees and pay the same to plaintiff. When said pay rolls were presented D. owed, and still owes, defendant an amount in excess of all such deductions. *Held*, that plaintiff could not recover as for money had and received the amounts deducted by defendant by reason of the board, etc., furnished by plaintiff. *Sterling v. Ryan*, 72 Wis. 36, distinguished.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The plaintiff, by his complaint herein, claimed to recover for goods and merchandise alleged to have been sold and delivered by him to the defendant, and for board furnished to divers persons by him at defendant's request, between January 1 and July 20, 1896, amounting in all to $4,232.24, less payments aggregating $3,101.62, leaving an alleged balance of $1,130.62. The complaint also charged an indebtedness for money had and received. The answer was a general denial. The action was tried before a referee. Certain facts were undisputed, and may be stated as follows:

The defendant is a Wisconsin corporation, and was during the year 1896 engaged in grading and building a portion of the roadbed of the Minneapolis, St. Paul & Ashland Railroad Company in the counties of Ashland and Bayfield, in this state. On the 22d of January, 1896, it entered into a written contract with one Dalquist, by which Dalquist agreed to build a certain part of said roadbed, between two and three miles in length, at certain specified rates of compensation, and in said contract it was agreed that whenever, in the opinion of the *McGeehan Construction Company*, it might be necessary to secure to the laborers employed by Dalquist their wages, the construction company was authorized to pay said laborers the amount due them, and deduct such

payments from the amount payable to Dalquist. Dalquist immediately entered upon the work, and employed the plaintiff, *Erickson*, to run a boarding camp and store for the laborers employed, the price of board being fixed at $3.50 per week. *Erickson* had no agreement, personally, with the *McGeehan Construction Company* or its officers prior to entering upon the work or at any time. During the progress of the work the construction company furnished to Dalquist provisions for his camp, merchandise for the store, and other articles necessary for the work, to the amount of $3,101.62, which were charged to Dalquist upon its books as advances, and which compose the credits alleged by the present plaintiff in his complaint in this action. At the end of each month a duplicate pay roll was made up by Dalquist's bookkeeper, and furnished to the *McGeehan Construction Company*, showing in different columns the names of men employed, the time and rate of compensation of each man, the amount to be deducted from each man's wages for board and merchandise furnished from the camp store and medical fees, and the balance due each man. The charges against the men for board and merchandise were in separate columns, and were headed "Board to *O. W. Erickson*," and "Advances, Cash and Merchandise," respectively. In the January pay roll the amounts charged under these two heads were $9.10 and $5.25, respectively, and these amounts were deducted from the pay of the men, and paid by defendant's cashier to *Erickson*, through one Colquhoun, who was Dalquist's bookkeeper and also acted as bookkeeper for *Erickson*. In the February pay roll the columns were $280.70 and $42.10, respectively, and these sums were also paid by defendant's cashier to Colquhoun for *Erickson;* but a few days later $275 of the amount was returned, because it was concluded by *Erickson* and his bookkeeper that it was not due on account of goods and merchandise in transit. These payments were charged to Dalquist

on defendant's books. In the March pay roll the two items were $616.45 and $96.80, respectively, and *Erickson* (through Colquhoun) claimed a net balance due him of $224.50, but this was not paid, although *Erickson* claims that defendant's cashier gave him a duebill for the amount. Pay rolls were furnished by Dalquist for the months of April, May, June, and July, in all of which there appeared large sums due *Erickson* under the heading of "Board," and also sums advanced in cash or merchandise, but no further payments were made to *Erickson*, the reason being, as stated by defendant, that Dalquist was at all times indebted to the defendant, and had nothing coming to him after the February pay roll was presented. That Dalquist owed the defendant at these times, as stated by defendant's cashier, is not denied, and it also appears without contradiction that in August, 1896, when the transaction between Dalquist and defendant closed, Dalquist was indebted to defendant in the sum of $2,236.60 upon the contract.

While the plaintiff does not claim that he personally made any contract with the *McGeehan Construction Company*, he introduced the testimony of Dalquist and others tending to show a promise by defendant to Dalquist to pay him (*Erickson*) the board and merchandise bill. This testimony is, however, denied by the defendant's officers, and the claim made by them that they dealt only with Dalquist and never agreed to make any payments to *Erickson*, but supposed him simply an employee of Dalquist, and paid him the amounts shown on the January and February pay rolls simply upon request of Dalquist's bookkeeper.

The referee found as a fact that no contract was made between *Erickson* and the defendant, and that the payments made on the January and February pay rolls were simply paid to *Erickson* upon request of Dalquist, and charged to Dalquist by defendant; that no merchandise was sold or board furnished by the plaintiff to defendant, or to any per-

son by defendant's request, and that the defendant had received no money belonging to plaintiff; and from these facts the referee concluded as matter of law that the complaint should be dismissed.

Upon motion the circuit court set aside the referee's findings, and found that the defendant agreed to pay in full all men employed by its subcontractors, and withheld the amount due the plaintiff for board and merchandise furnished the men in pursuance of an agreement between Dalquist, the plaintiff, the defendant, and the men, respectively, and rendered judgment for the plaintiff for the amount claimed in the complaint, with interest; from which judgment the defendant appealed.

For the appellant there was a brief by *Lamoreux & Shea*, and oral argument by *W. F. Shea*.

For the respondent there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill*.

WINSLOW, J. The issues litigated in this case were two in number: (1) Was there a contract made by the defendant with *Erickson*, or with Dalquist for his benefit, that it would reserve the amounts of the board and merchandise bills of the men, and pay the same to *Erickson?* and (2) Has the defendant received moneys which in justice and right dealing belong to *Erickson?*

Upon the first of these questions the referee found from the evidence that no such contract was made. There was ample evidence to sustain this finding, and the fact found was not intrinsically improbable. Giving to the referee's finding that effect to which it is entitled, namely, that it must stand unless against the clear preponderance of the evidence (*Johnson v. Goult*, 106 Wis. 247), we cannot see how the trial court was justified in reversing it. There was ample evidence to support it, and certainly there was no clear preponderance against it. Hence the finding of the referee must stand.

The defendant having made no contract to pay *Erickson* or reserve any moneys for his benefit, it is impossible to see how it can be said to hold any money which, in justice and right, belongs to him. Its only contract was with Dalquist. When the pay rolls were presented, Dalquist owed, and still owes, it a large amount of money. It has, in fact, received nothing except that which is its own property, and by no means all of that. If it be now compelled to pay *Erickson*, it will simply pay him out of moneys which, in justice and right, are its own moneys, instead of out of moneys justly belonging to *Erickson*. The case of *Sterling v. Ryan*, 72 Wis. 36, which is relied on by respondent, would justify no such judgment, because there the fact was found that there was an agreement participated in by all parties that the laborers' board bills should be reserved by the contractors, and paid to the boarding house keepers. There being no such agreement in this case, it has no application.

By the Court.— Judgment reversed, and action remanded with directions to enter judgment for the defendant upon the findings of the referee.

McGinn, Respondent, vs. French, Administrator, Appellant.

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April 27 — May 15, 1900.

Appeal: Review of evidence: Agency: Landlord and tenant: Agreement to repair: Negligence: Contributory negligence: Verdict.

1. Where the record shows that at the close of the testimony a motion was made to direct a verdict, which was denied and an exception duly taken, the testimony will be reviewed on appeal in order to determine whether the motion should have been granted, although no motion for a new trial was made.
2. Where a married woman made a lease of certain premises for and on behalf of her husband, she cannot maintain an action to recover for injuries caused by defective steps, based on the existence of a contract relation between herself and the landlord whereby

he agreed to repair the steps and his failure to perform such agreement: her action to recover for such injuries must be sustained, if at all, as an action for negligence.

3. Where a tenant knew that the stairway in such case was out of repair and dangerous, and that it could be repaired at a trifling expense, but, before being injured thereon, continued to use it for more than a year without repairing it, and neglected to insist on the alleged promise of the landlord to make the repairs, such continued use was at the tenant's risk, and hence relieved the landlord from liability to respond in damages for the accident.

APPEAL from a judgment of the superior court of Milwaukee county: GEO. E. SUTHERLAND, Judge. *Reversed.*

On April 7, 1896, the plaintiff, acting for her husband, leased of defendant the lower flat of a building owned by him for a term of month to month. At the rear of the building was a narrow platform, with four or five steps leading to the ground, which it is claimed the defendant agreed to replace by a new one. The plaintiff, with her husband, moved in immediately, and continued to occupy the premises and use the platform and stairway until September, 1897. On the evening of August 24, 1897, while descending the stairs, the plaintiff was injured by one of the stairs giving way. The evidence as to the exact nature of the defect is somewhat indefinite. The stairway was about two feet wide, and was made of two stringers, one of which was nailed to the side of the house. The plaintiff thus describes the situation: "The step gave way towards the side of the house, on the outside where it was fastened, nearest the house. This outside looked as though it broke right off, but that toward the house was all loose. The tread of the step upon which I placed my foot tipped right in on the side toward the house, and it turned over." Again: "It was split right back from here, right down to there [indicating]. The step setting on there fell right over, so that I found the grain of the wood had been split down, right through, so as to carry this projection right away." The con-

clusion from all the testimony is that the step was loose from the stringer on the side toward the house, and that that part of the outside stringer upon which the step rested was broken off, the break being new. The stairs were repaired the next day by the plaintiff's husband by the use of a few nails, and they continued to use them until they vacated the premises. Whatever the defect was, the plaintiff knew of it when she moved in. The stairs were used daily, with knowledge of the defect, up to the day of the accident. The jury found that the steps were in a defective and dangerous condition at the time the house was rented, and so continued up to the day of the accident, and that plaintiff knew of such defective and dangers condition from the time she rented the house. A number of other questions were included in the special verdict, which are not considered important in this litigation. A motion to direct a verdict for defendant was denied, and an exception duly taken. Judgment was entered for plaintiff for $2,100 damages and costs, from which the defendant has appealed.

For the appellant there was a brief by *G. W. Hazelton* and *Turner, Pease & Turner*, and oral argument by *W. J. Turner*.

Edgar L. Wood, for the respondent.

BARDEEN, J. No motion for a new trial was made, and the plaintiff argues that the court will not review the evidence. The record shows that at the close of the testimony the defendant made a motion to direct a verdict in his favor, which was denied and an exception duly taken. The rule in such cases is that the court will review the testimony, in order to determine whether the motion should have been granted. *Second Nat. Bank v. Larson*, 80 Wis. 469.

The plaintiff is a married woman, and made the lease of the premises in question for and on behalf of her husband; hence the agreement to repair or rebuild the stairway, if

any was made, was with her husband, and not with her. Such being the case, the effort made to sustain this action, because of a contract relation between the plaintiff and defendant must fail. The action, if sustainable at all,—a point we do not find it necessary to decide,—must be sustained as an action for negligence. Assuming, however, for the purposes of this action, that such an action can be maintained by the plaintiff, we will proceed to review the case.

The evidence and findings of the jury disclose this state of facts: At the time the premises were rented, in April, 1896, the steps of this stairway were unsafe and dangerous, and continued in that condition until the day of the accident, August 24, 1897. During all this time the plaintiff used the stairs daily, with full knowledge of such unsafe, dangerous, and defective condition. The evidence of the precise defect which caused the accident is quite indefinite, as preserved in the record. A fair inference from the plaintiff's testimony is that it was caused by the step being loose. The defendant claimed that it was caused by a wagon striking the outside stringer, and breaking or splitting off that portion which supported the step upon which the plaintiff fell. At any rate, the evidence was undisputed that this part of the stringer was broken off; that the break was new; the stringer bore the marks of a blow or some force applied to it; and that the plaintiff and her sister had used the stairway safely about three quarters of an hour before the accident. It is also an accepted fact that the plaintiff's husband repaired the stairs the next morning, or soon afterwards, by the use of a few nails, and continued to use them, without further repairs, so long as they lived there. The plaintiff testified that she saw the repairs made, and that they consisted in driving a few nails into the break and into the other side towards the house, and that it may have taken her husband five, ten, or fifteen minutes to do the job. Whatever the defect was, it is perfectly evident that a few min-

utes' work with a hammer and nails would have made the steps absolutely safe. If these steps were as unsafe, defective, and dangerous as the plaintiff would have us believe, it was little less than foolhardy for any one to attempt to use them. If they could be repaired, as they were, at so slight an expense and with so little effort, the continued use without such repair was an assumption of the risk of accident. Knowing these stairs were unsafe, the liability of danger great, and the expense of repairs trifling, it was the plain duty of the tenant to make them, and thus save his family from the threatened danger. *Cook v. Soule*, 56 N. Y. 420. It was but a matter of common prudence, and the tenant, knowing the danger of loss or injury to be great, cannot continue the use of the dangerous premises, and hide behind a promise to repair. See *Miller v. Mariner's Church*, 7 Me. 51; *Town v. Armstrong*, 75 Mich. 580; *Purcell v. English*, 86 Ind. 34. If it be admitted that there was a promise to repair in this case, the rule of law applicable to plaintiff's case is in no way different from the one applicable to the relation of master and servant. It is a rule designed for the benefit of employees engaged in work where the machinery used or the means employed are of a kind of which the user can have little knowledge, and does not apply to means or appliances of ordinary use, and with which they are entirely familiar. Bailey, Personal Injuries, § 3103. When the danger is open and menacing, continued use of the defective appliances is at the risk of the user. *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191; *Meador v. L. S. & M. S. R. Co.* 138 Ind. 290. In this latter case the servant was using a ladder, one of the steps of which was not nailed tight enough to the side. It could have been repaired by the use of a hammer, or any convenient stone or brick. The court denied a recovery, because the defect was obvious, could have been repaired with a slight effort, and by its continued use the servant assumed the risk of accidents.

So, in this case, it is shown that the alleged defect was open and visible, had been known to the plaintiff for more than a year, and that it could have been repaired at a trifling expense. Continued use with knowledge of the dangerous condition of the stairway was a clear assumption of the risk of accident, which was not relieved by the alleged promise to repair. Every reasonable probability of the case, however, supports the defendant's contention as to the cause of the accident. The fact that the stairway had been used in safety but a short time before the accident, the mark of the wagon on the side of the outside stringer, and the freshness of the break, the fact that the driveway next to the stairs was in frequent use by teams, all tend to show that the break was caused by some wagon being forcibly run against the stringer. If such were the case, there would be no obligation upon defendant to respond in damages for the accident. The jury having adopted the plaintiff's theory of the accident, the case must go upon that basis. It is therefore considered that the evidence conclusively shows that plaintiff assumed the risk of injury by the continued use of the stairway under the circumstances in proof, and the court ought to have directed a verdict for defendant.

By the Court.— The judgment of the superior court is reversed, and the cause is remanded for a new trial.

COTZHAUSEN, Respondent, vs. H. W. JOHNS MANUFACTURING COMPANY, Appellant.

April 27 — May 15, 1900.

Garnishment: Dismissal of principal action: Costs: Appeal from clerk's taxation.

1. Where the plaintiff, after service of garnishee process, discontinues the principal action and judgment of discontinuance is thereupon entered, the defendant has judgment within the meaning of sec.

2766, Stats. 1898 (providing that, if the defendant have judgment, the garnishee action shall be dismissed with costs), and he is thereupon entitled to tax his costs in accordance with sec. 2921, Stats. 1898, regulating the items of the fee bill.

2. In such case sec. 2772, Stats. 1898 (providing that in all cases not expressly provided for the court may, in its discretion, award costs in favor of or against either party), does not apply, the case of dismissal of garnishment proceedings upon judgment for defendant in the principal action being expressly provided for by sec. 2766, Stats. 1898.

3. Sec. 2762, Stats. 1898 (providing that in case the garnishee's answer shall show indebtedness to the defendant the garnishee may withhold three dollars as his costs), does not limit the amount of costs which, under sec. 2766, Stats. 1898, the defendant can recover in the garnishee action upon the discontinuance of the principal action.

4. Sec. 2762, Stats. 1898, fixing the garnishee's costs at three dollars, where his answer shows a present indebtedness to defendant, does not apply where the garnishee's answer shows an indebtedness to some corporation of the same name, the identity of which with the defendant is not conceded.

5. On appeal from the taxation of costs in favor of the defendant and against the plaintiff, the fact that the rights of the garnishee against the plaintiff are ignored does not prejudice the plaintiff.

6. Where on taxation of costs by the clerk none but general objections are overruled, specific items of the bill cannot be reviewed on an appeal from the clerk's taxation.

APPEAL from orders of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Plaintiff, having sued defendant as a New Jersey corporation, garnished Anton Stollenwerk *et al.* They answered, admitting an indebtedness of $772.50 to a corporation of the same name as the defendant, but alleged that their creditor contended that it was not identical with, but entirely distinct from, the defendant sued by the plaintiff. Said answer submitted the question of liability to the court, and offered to pay the money upon being properly protected. No issue was taken upon this answer. The principal defendant at one time made a petition that this money be ordered paid into court, and paid over to it upon the giving of a bond, which application was denied. Plaintiff, after judgment in

his favor in the principal action, prayed judgment that the garnishee be required to pay into court, which apparently never was passed upon by reason of an appeal from that judgment and stay bond. The judgment for plaintiff in the principal action being reversed in this court (100 Wis. 473), the plaintiff discontinued, and a judgment of discontinuance was entered in the principal action. Thereafter, on motion of the defendant's attorneys, the court entered a judgment dismissing the garnishee action, whereupon the defendant, upon notice, presented for taxation its bill of costs. To that the plaintiff interposed four objections: first, that defendant was not entitled to costs in the garnishee action, it not having served any answer therein; second, that costs were limited by law to three dollars; third, to specific items of party's fees; and, fourth, "to all of defendant's alleged disbursements, and to each and every item thereof, for the reason that the same were not lawfully incurred, and the plaintiff is not liable therefor." The third objection (to specific items of party's fees) was sustained by the clerk, and upon the fourth objection (to disbursements) one item was disallowed, the others being allowed; whereupon the bill was taxed at the sum of $42.32, and that amount included in the judgment. The plaintiff thereafter gave notice for the discontinuance of the garnishee action, and moved the court to vacate and set aside the judgment entered in the garnishee action in favor of the principal defendant and against the plaintiff, and also applied for a review of the taxation of costs by the clerk. Upon the first of these motions the court entered the following order: "Ordered and adjudged that said motion be, and the same is, granted. Let the clerk of this court make the necessary entries accordingly, vacating said judgment as to costs in favor of the *H. W. Johns Manufacturing Company.*" Upon the second the following order was entered: "Ordered and adjudged that said motion be granted, and the plaintiff's several objections, as interposed

before said clerk, are hereby sustained. Let the clerk of this court make the necessary entries conformable hereto." Defendant, after excepting to both said motions, appealed therefrom by a single notice of appeal.

Joseph B. Doe, for the appellant.

F. W. von Cotzhausen, respondent, *in persona.*

DODGE, J. The question presented is purely a statutory one. With the propriety or equity of the result this court cannot concern itself. With the legislature lay the question of policy, and on that branch of the government must rest responsibility for any results. Sec. 2766, Stats. 1898, provides: "The proceeding against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant, and all the provisions of law relating to proceedings in civil actions at issue, including examination of the parties, amendments and relief from default or proceedings taken, and appeals and all provisions for enforcing judgments shall be applicable thereto; but when the garnishment is not in aid of an execution no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, although it may be noticed for trial; and if the defendant have judgment the garnishee action shall be dismissed with costs." The defendant had judgment. The garnishee action must, therefore, be "dismissed, *with costs.*" "When allowed, costs shall be as follows" (fee bill). Sec. 2921. In attempted accordance with that statute, the allowance was had in the judgment as originally entered. At least, no objections to specific items were overruled by the clerk, and therefore properly before the court for review. The conclusion is irresistible that the judgment was correct as originally entered, unless some other statute contradicts and prevails over those above referred to. Is there any such? Counsel for respondent point only to sec. 2772, providing: "In all

cases (except trial of issue) under this chapter *not expressly provided for* the court may award costs in favor of or against any party in its discretion." But the case of dismissal of garnishment upon judgment for defendant is "expressly provided for," and that provision of sec. 2772 cannot apply to the present case.

Counsel also urge that the amount of costs is limited to three dollars. That contention must rest on sec. 2762, but that section fixes three dollars as the amount only "in case the garnishee answer shall show indebtedness to the defendant," whereupon the garnishee may withhold three dollars for his costs upon paying the money into court. In the case before us the answer did not show indebtedness *to the defendant*, but to some corporation of the same name, the identity of which with the defendant was not conceded. We have searched diligently for other statutory provisions, but have found none which can justify us in denying effect to the unequivocal language of sec. 2766, above quoted. *Ita lex scripta est.*

Respondent suggests that the judgment for costs ignored the rights of the garnishee. If so, the right to complain is with the latter. It is mere *jus tertii*, infringement of which cannot be prejudicial to respondent.

We cannot consider any of the specific items of costs, for none but general objections were overruled by the clerk. General objections cannot justify review of specific items on appeal from the clerk's taxation. Circuit Court Rule XXXIII.

We are constrained to hold that no case was presented for the exercise of judicial discretion in modifying the judgment as was done, and that error was committed in each of the orders granting such modification.

By the Court.— Both orders appealed from are reversed, and the cause remanded with directions to reinstate the judgment as originally entered.

HUEBSCHMANN and others, imp., Plaintiffs in error, vs. COTZHAUSEN, Defendant in error.

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April 27 — May 15, 1900.

Ejectment: Res adjudicata: *Betterments: Parties: Writ of error: Variance from record: Immaterial error.*

1. On the final settlement of an estate in 1885, defendants being parties to the proceeding and the court having jurisdiction of the subject matter and the persons, the county court found and adjudged that plaintiff's grantor was the legitimate child and heir of a deceased devisee under testator's will, and entitled to an interest in the real estate in question. In 1895, on application of defendants to set aside so much of the judgment of the county court as adjudged plaintiff's grantor entitled to a share in such real estate, the county court found that no fraud had been practiced, and reaffirmed its judgment. On appeal to the circuit and supreme courts, respectively, the judgment of the county court was in all things affirmed. In ejectment by plaintiff to recover his share of the estate, it was *held*: that the judgment of the county court was *res adjudicata* as to the questions of the legitimacy and heirship of plaintiff's grantor.
2. Where, in ejectment, it appears from the undisputed evidence that the amount of rents and profits received by the defendants during the term of their adverse possession exceeds the amount paid by them for repairs, improvements, and taxes, it is not error to refuse a request to have the jury assess the value of the improvements made and taxes paid by them.
3. In an action of ejectment a tenant of the adverse claimants who retains possession of the premises is a necessary defendant under sec. 3075. Stats. 1898, and should be joined in a writ of error to review a judgment against him and the other defendants; but a failure in that regard is not a defect going to the jurisdiction, but an irregularity which may, in the discretion of the court, be cured by amendment.
4. A motion to dismiss or quash a writ of error because of such a defect will not be granted unless made soon after the case reaches the supreme court.

ERROR to review a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

For the plaintiffs in error there was a brief by *Thos. H.*

Gill, attorney for *C. C. Huebschmann*, and *J. C. Kerwin* and *Adolph Huebschmann*, attorneys for the Huebschmann heirs, and oral argument by *Mr. Huebschmann* and *Mr. Gill.*

For the defendant in error there was a brief signed by *F. W. v. Cotzhausen*, defendant in error, and *Sylvester, Scheiber & Orth*, of counsel, and oral argument by *Mr. Cotzhausen.*

CASSODAY, C. J. On April 5, 1866, John Hess, of Milwaukee, duly executed his last will and testament, wherein and whereby he purported to give to his wife, Regina, all his personal property absolutely, and also the use of his real estate for the term of twenty-five years after his death, subject to the payment by her of all taxes and assessments thereon during such term; and the remainder of such real estate he devised, the undivided one-half to the children of his daughter, the plaintiff *Crescentia C. Huebschmann*, and the other undivided one-half to the children of his son, Philip Hess, then living in Louisiana, and named his widow, Regina, as executrix of his will. John Hess never had any other children. On October 26, 1866, the son, Philip, died in New Orleans, leaving, him surviving, a widow, who died during the following year, and also a little boy, John Hess, who died a few months after his father, Philip, and also a daughter, Susannah, who was born December 1, 1862, and who was consequently nearly four years of age when her father, Philip, died. On April 30, 1870, the testator, John Hess, died at his home, in Milwaukee, leaving, him surviving, his widow, Regina, also his daughter, the plaintiff in error, *Crescentia C.*, and her four children, plaintiffs in error in this action, and his granddaughter Susannah Hess, daughter of his deceased son, Philip. On November 14, 1870, such will of John Hess was admitted to probate in the county court of Milwaukee county, and the widow, Regina, was appointed such administratrix. On May 13, 1871, the widow, Regina, intermarried with one Ferdinand Thoma, and

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HUEBSCHMANN and others, imp., Plaintiffs in error, vs. COTZHAUSEN, Defendant in error.

April 27 — May 15, 1900.

Ejectment: Res adjudicata: *Betterments: Parties: Writ of error: Variance from record: Immaterial error.*

1. On the final settlement of an estate in 1885, defendants being parties to the proceeding and the court having jurisdiction of the subject matter and the persons, the county court found and adjudged that plaintiff's grantor was the legitimate child and heir of a deceased devisee under testator's will, and entitled to an interest in the real estate in question. In 1895, on application of defendants to set aside so much of the judgment of the county court as adjudged plaintiff's grantor entitled to a share in such real estate, the county court found that no fraud had been practiced, and reaffirmed its judgment. On appeal to the circuit and supreme courts, respectively, the judgment of the county court was in all things affirmed. In ejectment by plaintiff to recover his share of the estate, it was *held*: that the judgment of the county court was *res adjudicata* as to the questions of the legitimacy and heirship of plaintiff's grantor.
2. Where, in ejectment, it appears from the undisputed evidence that the amount of rents and profits received by the defendants during the term of their adverse possession exceeds the amount paid by them for repairs, improvements, and taxes, it is not error to refuse a request to have the jury assess the value of the improvements made and taxes paid by them.
3. In an action of ejectment a tenant of the adverse claimants who retains possession of the premises is a necessary defendant under sec. 3075. Stats. 1898, and should be joined in a writ of error to review a judgment against him and the other defendants; but a failure in that regard is not a defect going to the jurisdiction, but an irregularity which may, in the discretion of the court, be cured by amendment.
4. A motion to dismiss or quash a writ of error because of such a defect will not be granted unless made soon aft[illegible] the supreme court.

ERROR to review a judgment of the [illegible] waukee county: J. C. LUDWIG, Judge.

For the plaintiffs in error there w[illegible]

Gill, attorney for *C. C. Huebschmann*, and *J. C. Kerwin* and *Adolph Huebschmann*, attorneys for the Huebschmann heirs, and oral argument by *Mr. Huebschmann* and *Mr. Gill*.

For the defendant in error there was a brief signed by *F. W. v. Cotzhausen*, defendant in error, and *Sylvester, Scheiber & Orth*, of counsel, and oral argument by *Mr. Cotzhausen*.

CASSODAY, C. J. On April 5, 1866, John Hess, of Milwaukee, duly executed his last will and testament, wherein and whereby he purported to give to his wife, Regina, all his personal property absolutely, and also the use of his real estate for the term of twenty-five years after his death, subject to the payment by her of all taxes and assessments thereon during such term; and the remainder of such real estate he devised, the undivided one-half to the children of his daughter, the plaintiff *Crescentia C. Huebschmann*, and the other undivided one-half to the children of his son, Philip Hess, then living in Louisiana, and named his widow, Regina, as executrix of his will. John Hess never had any other children. On October 26, 1866, the son, Philip, died in New Orleans, leaving, him surviving, a widow, who died during the following year, and also a little boy, John Hess, who died a few months after his father, Philip, and also a daughter, Susannah, who was born December 1, 1862, and who was consequently nearly four years of age when her father, Philip, died. On April 30, 1870, the testator, John Hess, died at his home, in Milwaukee, leaving, him surviving, his Regina, also his daughter, the plaintiff in error, C., and her four children, plaintiffs in error in the d his granddaughter Susannah Hess, daughter, ed son, Philip. On November 14, 1870, such ess was admitted to probate in the county aukee county, and the widow, Regina, was appointed administratrix. On May 13, 1871, the widow, ermarried with one Ferdinand Thoma, and

thereupon ceased to be such administratrix, and August 21, 1871, Francis Huebschmann was appointed such administrator, with the will annexed. On June 11, 1881, the granddaughter Susannah intermarried with one John La Place of New Orleans. December 3, 1883, and after the granddaughter Susannah had become twenty-one years of age, she sold her share and interest in such real estate, and she and her husband conveyed the same, by a duly executed deed of conveyance, to one Frederick Roth, of Milwaukee.

May 6, 1884, the granddaughter Susannah and Frederick Roth filed their petition in the county court, reciting the facts stated, and praying for the final adjustment and settlement of all matters and things pertaining to the estate of John Hess, deceased, and for the construction of such will, and the determination of the rights and interests of the parties interested, and that the residue of the estate be assigned to the persons entitled to the same. Thereupon, and on May 7, 1884, the county court made an order in the matter of such will that such application be heard at the time and place therein named, and that notice of such application and hearing be given to all persons interested, by the publication of a copy of such order for three successive weeks, once in each week, prior to such hearing, in the newspaper therein named. Due proof of such publication was filed in the county court in such matter May 31, 1884. Thereupon Emil Wallber, then an attorney at law in Milwaukee, appeared for two minor children of the daughter (*Francis* and *Anna*), plaintiffs in error herein, and by their guardian, Gustave Reuss, put in an answer for them to such petition, and, among other things, therein alleged, in effect, that the estate of John Hess, deceased, had not been fully administered; that no account had been rendered either by the executrix or by the administrator *de bonis non;* that no vouchers had ever been presented of the payment of the debts and funeral charges of the deceased; that Susannah

La Place was not a child and heir at law of Philip Hess, the son of John Hess, deceased; that neither Susannah nor Frederick Roth was interested in the estate of John Hess, deceased; that neither Susannah nor Frederick Roth was entitled to any part of the estate of John Hess, deceased.

On June 14, 1884, the daughter, *Crescentia C.*, one of the plaintiffs in error herein, and the widow, Regina, were cited by the county court to appear at a time and place named, then and there to answer such questions as might be put to them relative to the matters then in issue in such estate. Thereupon commissions were issued and testimony taken in New Orleans in respect to the paternity and legitimacy of the granddaughter Susannah, and after full hearing of all parties in the county court, and on January 3, 1885, the county court made its final order, judgment, and decree, reciting therein, in effect, that it being satisfactorily made to appear that due notice of such hearing had been given as required by law and the former order of the court; that the facts stated in the petition of Susannah and Roth were true, and that all the debts and expenses of last sickness, funeral charges, and expenses of administration up to that time had been paid; that no personal property remained in the hands of the former executrix and administrator *de bonis non* for distribution, and that there was no necessity for any further administration or continuance of the estate in court; that the testator died seised in fee simple of the lands described; that the only children of the daughter, *Crescentia C.*, were the plaintiffs in error herein, *Adolph*, *Amalia*, *Francis*, and *Anna*, the two last named being minors, who had appeared therein by Gustave Reuss, their general guardian, Hon. Emil Wallber, an attorney of that court, acting as counsel; that Susannah La Place, of New Orleans, was the sole child and heir at law of Phillip Hess, the son of the testator, and that all her right, title, and interest in and to the real estate of which the testator died seised had, by deed of conveyance dated December 3, 1883, for a valuable consideration, been

transferred and set over to Frederick Roth of Milwaukee,—by virtue of the power in such court vested, and pursuant to the statute, and terms of such last will and testament, it was thereby ordered, adjudged, and decreed that the real estate described be, and the same was thereby, assigned and transferred as follows: One undivided half to the above-named *Adolph*, *Amalia*, *Francis*, and *Anna*, share and share alike, and the other undivided one-half to the above-named Frederick Roth, the assignee of Susannah La Place; the whole of the estate, however, being subject to a term of years usufruct, created by the terms of the will in favor of the testator's widow, Regina Hess, then the wife of one Ferdinand Thoma, of Milwaukee, which term extends for a period of twenty-five years from April 30, 1870, on certain conditions in such will enumerated and specified, and subject, further, to the right of the widow to sell, let, rent, or dispose of the buildings on such premises as she might see fit and proper. Such order, judgment, and decree contained certain other matters, not necessary here to state.

On April 29, 1895, the plaintiff in error *Crescentia C.* filed her petition in the county court in such matter, praying that so much of the order, judgment, and decree so entered January 3, 1885, as adjudged that Frederick Roth, as the assignee of Susannah La Place, was entitled to one undivided half interest in and to the real estate described, be declared null and void, and that Frederick Roth and the defendant in error herein, *Frederick W. v. Cotzhausen*, be cited to appear before such court and show cause why such order and decree should not be adjudged null and void, and why an order should not be entered assigning to her, as the heir at law of John Hess, the undivided one-half so assigned to Frederick Roth; and thereupon Frederick Roth and *Frederick W. v. Cotzhausen* were cited to appear and answer such petition at a time and place therein named, and they so appeared, respectively, and went to trial.

Upon such hearing, and the records, evidence, and proofs

adduced at such hearing, the county court found and adjudged that neither *Frederick W. v. Cotzhausen* nor Frederick Roth had imposed upon the court in any way or manner in obtaining the final decree and order of January 3, 1885, and that neither of them was guilty of any of the frauds or evil practices charged and insinuated against them in and by such petition; that Susannah La Place was, in effect, the sole child and heir of Philip Hess, and the only one entitled to claim as such under such will; that *Crescentia C.*, the petitioner, was a party to the proceeding culminating in such decree, and that the court had full jurisdiction of the subject matter and of all the parties therein interested, and that such order and decree ought not to be disturbed; that the citation issued be discharged, and the petition of *Crescentia C.* be dismissed.

On June 27, 1895, the plaintiff in error, *Crescentia C.*, appealed from such judgment to the circuit court. Upon the trial and hearing of such appeal in the circuit court it was found by that court "that the county court had full jurisdiction of parties and subject matter when entering its decree of January 3, 1885; that the evidence and proofs submitted utterly failed to support the material allegations of the appellant's petition," and, as conclusions of law thereupon, the court held "that the order appealed from ought to be affirmed, and that judgment be entered accordingly, with costs to be taxed in favor of the respondents." Judgment was thereupon entered accordingly. *Crescentia C.* appealed from that judgment to this court, and the judgment was affirmed October 22, 1897. *Will of Hess: Huebschmann v. Cotzhausen*, 97 Wis. 244.

The term of the widow, Regina, fully expired April 30, 1895. On December 17, 1897, the defendant in error, *Frederick W. v. Cotzhausen*, commenced this action of ejectment against *Crescentia C.* and her four children named, and one Herman Valet and one Lydia Webber, to recover the undi-

vided one-fourth of the real estate described,—being the premises so conveyed to him by Frederick Roth, and one half of the premises so conveyed to Roth by the granddaughter Susannah. The complaint therein alleged, in effect, the facts stated, and that the defendants Valet and Webber, respectively, were in the actual possession of parts of the premises as tenants of *Crescentia C.* and her four children, and were therefore joined as defendants therein. Such possession by Valet and Webber was expressly admitted in the answer of *Crescentia C.* herein, and also in the separate answer of her four children named.

At the close of the trial the jury returned a verdict to the effect: (1) That Susannah La Place was the legitimate child of Philip Hess. (2) That the fair rental value of the premises in question, entirely free and clear of all buildings, during the period from May 1, 1895, to the date of such verdict, would have been nothing. (3) That the jury found for the plaintiff, that he was the owner of an estate in fee simple and had a right to recover the possession of an undivided one-quarter of the premises therein described; that the defendants had unlawfully withheld the possession thereof from the plaintiff ever since May 1, 1895, and were in the joint possession thereof; and that they assessed the plaintiff's damages for the unlawful withholding thereof at the sum of six cents. Thereupon, and on June 19, 1899, judgment was entered on such verdict in favor of the plaintiff therein, *Frederick W. v. Cotzhausen*, and against *Crescentia C.* and her four children, *Adolph*, *Amalia*, *Francis*, and *Anna*, and also against the defendant therein, Herman Valet. To reverse that judgment the defendants therein, *Crescentia C.* and her four children, *Adolph*, *Amalia*, *Francis*, and *Anna*, sued out this writ of error.

The principal controversy in the trial court was as to whether Susannah La Place was the legitimate child of Philip Hess, deceased. Other questions involved were made

to turn upon the determination of that question. Numerous errors are assigned in regard to the admission of testimony, the form of the verdict, and the instructions to the jury. The view we have taken of the case makes it unnecessary to consider any of those questions. After careful consideration, we have reached the conclusion that the defendant in error was entitled to the verdict rendered, upon the undisputed record evidence. By the judgment and decree of the county court, entered January 3, 1885, it was, after full hearing or opportunity for hearing, determined that Susannah La Place was the legitimate child of Philip Hess, and, subject to the balance of the term of the widow, and her right to sell, let, rent, or dispose of the buildings on the premises as she might see fit and proper, the one undivided half of the remainder of such real estate was thereby assigned and transferred to the four children of *Crescentia C. Huebschmann*, share and share alike, and the other undivided one-half was thereby assigned and transferred to Frederick Roth, as the assignee of Susannah La Place. Such adjudication was made upon the application of Susannah La Place and Roth, as her assignee, for an assignment of the residue of the estate as provided by statute (sec. 3940, Stats. 1898). Such issue was expressly raised by the answer of the two minor children of *Crescentia C.*, by their general guardian, as above stated. The statute expressly required such general guardian to "appear for and represent his ward in all actions and proceedings, except where another person is appointed for that purpose." Sec. 3982, R. S. 1878 and Stats. 1898. *Webber v. Ward*, 94 Wis. 605. No other person was so appointed. Notice of such hearing was given to the several adults interested, by publication, as required by the statute (sec. 3931, R. S. 1878), and also to the widow, Regina, and the daughter, *Crescentia C.*, by the county court citing them, respectively, to appear before that court, at a time and place therein named, to an-

swer such questions as might be put to them relative to the matters thus in issue in such estate. The judgment and decree thus rendered in the county court more than fifteen years ago appears to have been regular in all respects, and by a court having complete jurisdiction of the subject matter of the proceedings, and of the several persons interested. Such being the circumstances under which that judgment and decree was rendered, it would seem to be binding upon all parties interested. Sec. 3940, Stats. 1898; *Ford v. Smith*, 60 Wis. 225; *Hall v. Hall*, 98 Wis. 199.

But there is still another reason why such judgment and decree is binding upon *Crescentia C.*, who is the only one of the plaintiffs in error interested in the question of the legitimacy and heirship of Susannah La Place. Ten years after the rendition of that judgment and decree, the plaintiff in error *Crescentia C.* filed her petition in the county court in such matter to set aside and have declared null and void so much of such judgment and decree as adjudged that Roth, as such assignee, was entitled to the undivided one-half of such residue of such estate. Thereupon Roth and the defendant in error were cited to appear and answer such petition, which they did, as stated. Upon the trial of that issue the county court found, in effect, as indicated, that the court had not been imposed upon in the making of such final judgment and decree; that neither Roth nor the defendant in error had been guilty of any frauds or evil practices in the matter; that Susannah was the sole child and heir at law of Philip Hess, and entitled to the real estate so assigned to her, and that the court had full jurisdiction of the subject matter and of all the parties interested; and that the judgment and decree should not be disturbed. The plaintiff in error *Crescentia C.* then appealed from the judgment entered thereon to the circuit court, where such issues were retried; and at the close of such trial the judgment of the county court was in all things affirmed by the circuit court, and

upon her appeal from the judgment of the circuit court the same was affirmed in all things by this court. *Will of Hess: Huebschmann v. Cotzhausen*, 97 Wis. 244. We must regard the judgment and decree of the county court as *res adjudicata*. *Noonan v. Orton*, 4 Wis. 335; *S. C.* 27 Wis. 300; *Lathrop v. Knapp*, 27 Wis. 214; *S. C.* 37 Wis. 312; *Fire Department v. Tuttle*, 50 Wis. 552; *Ellis v. N. P. R. Co.* 80 Wis. 459; *Case v. Hoffman*, 100 Wis. 336–339, 351, 360.

We perceive no error in refusing the request of the plaintiffs in error to have the jury assess the value of the improvements made and taxes paid by them. It appears from the undisputed evidence that the amount of rents and profits received by them during the term of their adverse possession exceeded the amount paid by them for repairs, improvements, and taxes, and that the net balance in their hands after making all such payments was $694.75.

The defendant in error has suggested a question of practice which we do not feel at liberty to pass over in silence. Mrs. Webber, who was made a defendant in this action of ejectment, abandoned the premises *pendente lite*, and so the action as to her was discontinued. But the defendant Valet, in ejectment, who, as indicated in the statement, is conceded to be in the actual possession of a portion of the premises as tenant of *Crescentia C.* and her four children, remained such defendant, and the judgment is against him and the other defendants. Valet was a necessary defendant in the action of ejectment. Secs. 3075, 3076, Stats. 1898. But he did not join in suing out this writ of error. It was held by our territorial court that "a writ of error must be brought in the names of all the parties against whom the judgment was given, and, if the writ does not agree with the record in this respect, it may be quashed." *Doty v. Strong*, 1 Pin. 165. To the same effect, *Fotterall v. Floyd*, 6 Serg. & R. 315; *Hampton v. Rouse*, 13 Wall. 187; *Pearson v. Yewdall*, 95 U. S. 294; *Feibelman v. Packard*, 108 U. S. 14. But

the defect is a mere irregularity, which may, in the discretion of the court, be amended. It does not go to the jurisdiction. Had the motion to quash, as indicated in the first case cited, or to dismiss, as indicated in some of the other cases cited, been made soon after the case reached this court, it would probably have been granted. But, as it was not so made, we have felt called upon to dispose of the case on the merits.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

BARDEEN, J., took no part.

ORDWAY, Trustee, Appellant, vs. GARDNER and others, Respondents.

April 27 — May 15, 1900.

Wills: Construction: Trusts and trustees: Trust, when closed.

Testator gave the income of his estate to his wife for life, the remainder in equal shares to his children H. and M. and a trustee for a third child C., in trust to pay the income to C., and if C. for seven years from and after testator's death, or at any one continuous period of time, led a moral and sober life, the trustee to convey C. his share. *Held* that, it being conceded C. had led a moral and sober life for a period of seven years, the trust was closed and his interest in the remainder became vested, irrespective of whether or not the testator's widow was living at that time.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an action for the construction of the will of Amos H. Gardner, who died testate at the city of Milwaukee, June 23, 1883, leaving a widow, *Lydia Gardner*, and three children, viz. *Henry D.*, Mary L., and *Charlie N. Gardner;* his estate, real and personal, amounting to over $100,000. By

his will, after making certain specific bequests, he gave his widow a life estate in the homestead and its contents, with the remainder in fee to his daughter Mary L. The will then proceeded as follows:

"Fifth. I will and bequeath unto my beloved wife, in addition to the foregoing, and in lieu of dower in my real estate, all of the net income, rents, and profits, and interest, and product of all of the remainder of my property and estate, real, personal, or mixed, whatever and wherever situate, without any account to be given thereof whatsoever, to be by her held and owned absolutely; and if from any accidental cause such income, interest, rents, or product shall be insufficient for her comfortable support suitable to her situation or rank in life, then, and in that case, I direct and empower my executors from time to time to pay or make over to her in the most convenient form they are able so much of the body of my estate as shall be necessary for such suitable and comfortable support of my said beloved wife, *Lydia;* and I hereby empower my executors, or the acting executor, if but one, in case it is absolutely necessary, to do so for the purpose last aforesaid, to sell and convey such of my real estate as may in his or their judgment be sold to the best advantage for said purpose, but for no other; neither the said homestead nor any part thereof shall be sold for such purpose.

"Sixth. I give, devise, and bequeath all of the remainder, rest, and residue of my said estate after the death of my said beloved wife, *Lydia*, equally, share and share alike, unto my son *Henry D. Gardner*, daughter *Mary L. Gardner*, and Frederick T. Day, their heirs, executors, administrators, and assigns, forever. The said bequest and devise to said Frederick T. Day being solely and only upon the trust following, that is to say: That he hold, keep, rent, or invest the same as in his judgment he may deem best, hereby empowering and authorizing him to sell, convey, and con-

vert realty into personalty, and to again sell and reinvest in personalty said trust estate, as in his judgment he deem best, from time to time on until said trust is closed, and that he pay over the income thereof quarterly to my son *Charlie N. Gardner* during the natural life of him, the said *Charlie N.*, and in case my said son *Charlie N.* shall reform, and for three years, in the opinion of my said trustee, lead a moral and sober life, and shall desire to go into business, then, and in that case, my said trustee shall advance and pay over to him out of the body of said trust fund a moderate capital, not exceeding one fourth of said trust fund or share; and if my said son *shall for seven years from and after my death, or at any one continuous period of time, lead a moral and sober life*, in the opinion of my said trustee, then, and in that case, to pay and deliver, deed or convey, to him the remainder of such share or trust fund; otherwise in default of such reformation and sober life, at the death of my said son *Charlie N.* said trust shall be closed, and the whole of said share or trust fund then remaining shall belong to, be conveyed, paid, or delivered unto the legal heir or heirs of him, the said *Charlie N. Gardner*. In case my said son *Charlie N.* shall die before me, the one third of said remainder so bequeathed in trust for him shall belong to, and I give and bequeath the same, to my said son *Henry D. Gardner* and my said daughter Mary L. Gardner in equal portions, share and share alike, and to their heirs and assigns, forever. The trust herein created in favor of my said son *Charlie N.* is not personal in or to said Frederick T. Day, but is intended to be and may be executed in every respect by his successor in said trust, or by any trustee appointed by any court having jurisdiction over said trust; my intention being to make a generous, and at the same time safe, provision for my said son *Charlie N. Gardner*."

By the seventh clause he appointed his wife, *Lydia*, and Frederick T. Day executors of the will.

The facts in the case are undisputed, and are contained in the pleadings as follows: At the time of the testator's death, his widow, *Lydia*, was sixty-one years of age, and she is still alive and in good health; his son *Henry D.* was about forty years of age, *Charlie N.* about thirty-five years of age, and Mary L. about twenty years of age. The will was duly probated, and letters issued thereon to the widow alone, and the estate was thereafter settled, and an order of assignment made February 3, 1885. The estate assigned consisted of a certain amount of capital stock in an incorporated business concern, about $40,000 in notes and mortgages, three business buildings in the city of Milwaukee, and about eleven acres of land in Milwaukee county, outside of the city limits. By the order of assignment the homestead, with its contents, was assigned to the widow for life, with the remainder to Mary L.; and the residuary estate, real and personal, was assigned to the widow for life on the terms specified in the will. The daughter, Mary L., after arriving at the age of twenty-one years, made a will, devising her entire estate to her mother, and died May 26, 1886. Her will was afterwards duly probated, and her whole estate was assigned to her mother June 9, 1887. In November, 1887, *Lydia* brought action for the partition of the real estate against *Henry D.*, *Charlie N.*, and Frederick T. Day, as trustee, which action resulted in the real estate being partitioned between the parties, quitclaim deeds being executed to carry out such partition; and at the same time the parties agreed upon a division of the personal property, all of which, however, was left in the hands of Day to manage. This partition of real estate and division of personal property was all made subject to the life interest of *Lydia* under the will. Day remained in possession of the personal property until June 3, 1893, when he resigned, and the plaintiff was appointed trustee under the will in his place, and accepted the trust, and thereafter received from Day all of the personal property held by him in trust, except

$1,488.93, which was never paid over. Since that time the trustee has paid to *Lydia* the net income received from said trust property as fast as received.

In February, 1899, the defendant *Charlie N.* and his mother, *Lydia*, claimed that *Charlie N.* had then lived a moral and sober life for seven continuous years, and that, under the terms of the will, the trust should be closed, and the remainder in the trust property should be conveyed to *Charlie N.* by the trustee, subject to the life estate of *Lydia.* The plaintiff admits that *Charlie N.* has led a moral and sober life for seven years prior to the commencement of this action, but, being in doubt as to whether the trust is thereby closed, or can be closed, before the death of the mother, brings this action for construction of the will; all of the parties in interest being made parties to the action.

The circuit judge concluded that the trust was closed, and that it was the duty of the trustee to convey the remainder in the trust estate to *Charlie N.*, and entered judgment accordingly, from which judgment the trustee appeals.

David S. Ordway, appellant, *in pro. per.*

A. G. Weissert, for the respondents.

WINSLOW, J. This is essentially an amicable action, but it involves a controversy which is none the less real and earnest, although there are no personal animosities existing between the parties. The trustee entertains one view of the meaning of the sixth clause of the will in question, and the *cestui que trust* and his mother entertain a different view; and the trustee, with commendable prudence, desires an authoritative decision of the question, not from a desire to prolong his term as trustee, but so that he may be assured that he has performed his whole duty.

The trustee rightly says in his brief: "There is really no disputed question of fact between the parties. Substantially the only question for determination is as to whether the time has arrived when the trust can be lawfully closed." Further,

the trustee says: "The trustee [for the purpose of obtaining a decision upon that point] was and is willing to admit that the said *Charlie N. Gardner* has reformed, and lived a moral and sober life for a continuous period of more than seven years next prior to the commencement of the action."

The contention of the trustee, in substance, is that the trust cannot be closed until the death of the life tenant; that the seven years of sober life may be accomplished during the lifetime of the life tenant, but that it was not intended that the trustee should convey the trust property to *Charlie N.* until the death of his mother, upon the happening of which event the trustee should at once convey to the *cestui que trust* if living, and if, in the opinion of the trustee, seven continuous years of moral and sober life had then been accomplished.

On the other hand, the contention is that, when the seven years of moral and sober life are accomplished to the satisfaction of the trustee, the remainder becomes vested in *Charlie N.*, and the trustee should convey it to him, subject, of course, to the life estate in the mother. The trial judge took the latter view of the question, and we agree with his conclusion. The scheme of the fifth and sixth clauses of the will was evidently to give the mother a life tenancy in the whole residuum of the estate, with power of sale and consumption of the body of the estate in case of insufficiency of the usufruct for her comfortable support, and to give the remainder in equal shares to his three children. As to *Henry D.* and Mary L., their interests in remainder clearly vested at once upon the probate of the will, subject only to the rights of the life tenant. As to *Charlie N.*, however, his prospective interest vested in the trustee, also subject to the life estate, and subject to the contingent ripening of the remainder in fee in *Charlie N.*, and the consequent closing of the trust by seven continuous years of moral and sober life on his part.

The sole question is, Was it the intention of the testator, as expressed in his will, that this seven years could be accomplished and the trust closed during the life-time of the life tenant? We think the plain language of the will necessitates an affirmative answer to the question. That language is as follows: "And if my son shall for seven years *from and after my death, or at any one continuous period of time,* lead a moral and sober life in the opinion of my said trustee, then, and in that case," the trustee is to pay and deliver, deed or convey, to him (the son) the remainder of such share or trust fund. There seems little, if any, room for construction in these words. "*Seven years from and after my death, or at any one continuous period of time,*" standing alone, and without qualification, is certainly definite language with no uncertain meaning. To inject into it another qualification, namely, the previous death of the life tenant, would be to add a contingency which the testator did not add, and which is not necessarily implied by any other clause in the will. The remainder having thus vested in *Charles N.* by the performance of the condition named in the will, the trust is closed, and it becomes the duty of the trustee to turn over the trust estate as directed in the will.

By the Court.— Judgment affirmed.

St. Æmilianus Orphan Asylum, Respondent, vs. Milwaukee County, Appellant.

April 28 — May 15, 1900.

County board: Quorum: "Majority vote:" Statutes construed.

Sec. 2, ch. 267, Laws of 1895, provides that in any case in which a county contributes to the support of a child committed to an orphan asylum "said county may, by a majority vote of its board of supervisors, remove said child from said institution." Sec. 665, Stats. 1898, provides that "a majority of the supervisors entitled to

a seat in the county board shall constitute a quorum for the transaction of business," and that "all questions shall be determined by a majority of the supervisors present unless otherwise provided." *Held*, that for the purpose of a legal removal of a child so committed, a quorum of the members of the board is the board, and a majority vote of such quorum is a majority vote of the board.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

April 1, 1896, a quorum of the members of the board of supervisors being present, duly assembled for the transaction of business, by a majority vote of such members but by less than a majority of all of the members of such board, a resolution was in form adopted to the effect that certain children, theretofore duly committed according to law to the care and custody of the respondent and then in such care and custody, be removed therefrom. May 18, 1896, pursuant to such resolution, surrender of such children was duly demanded of the respondent, and was refused. Thereafter the respondent filed a claim against the county of *Milwaukee* for compensation for the care and support of such children. That part of the claim relating to the time subsequent to the date of such demand was disallowed. The respondent appealed to the circuit court for Milwaukee county, where a trial was had, resulting in a judgment against the county, upon the ground that the resolution referred to was not passed by a majority of all the members of the county board. The county appealed.

For the appellant there were briefs by *A. C. Brazee*, district attorney, and *A. C. Umbreit*, assistant district attorney, and oral argument by *Mr. Umbreit.*

For the respondent there was a brief by *Fiebing & Killilea* and oral argument by *H. J. Killilea.*

MARSHALL, J. The only question for consideration on the record is, Was the resolution for the removal of the children from the care and custody of respondent legally adopted?

That turns on the construction of the following language in sec. 2, ch. 267, Laws of 1895, relating to the authority of county boards in such cases: "In [any] case in which the county contributes to the support of any child" committed to any orphan asylum, "said county may, by a majority vote of its board of supervisors, remove said child from said institutions." If the words, "a majority vote of its board of supervisors," mean a majority only of the members present at the meeting, such members being sufficient in number to constitute a quorum for the transaction of public business, the decision of the trial court is wrong and the judgment must be reversed.

At common law a legal assembly of the members of a definite municipal governing body, like a city council or county board, is made up of a majority of all the members of such body. Such number constitutes a working quorum, and a majority vote thereof, for or against a proposition, is a determination of the whole body in regard to it. Dillon, Mun. Corp. § 278; *Rex v. Bellringer*, 4 Term, 810; *Ex parte Willcocks*, 7 Cow. 402–409; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *Buell v. Buckingham*, 16 Iowa, 284–291; *Heiskell v. Baltimore*, 65 Md. 125.

That is a universal rule applicable to all corporations, whether public or private. Thomp. Corp. § 3911. It was said by Chancellor Kent: "There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule on the subject; and if a corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the act or charter of incorporation." 2 Kent, Comm. 293.

That common-law rule, as to county boards, was embodied in sec. 665, Stats. 1898, in the following language: "A majority of the supervisors entitled to a seat in the county board shall constitute a quorum for the transaction of business. . . . All questions shall be determined by a majority of the supervisors present unless otherwise provided."

In view of what has preceded, it seems that, in the absence of a clearly expressed intent to the contrary, the will of a majority of a quorum of the members of a county board, regularly expressed by their votes, is the will of the whole board and the law of the corporation; and by that the statute in question must be tested. We must be able to say, in the light of that — and the other rule, that statutes in derogation of the common law should be strictly construed — that the legislature intended to displace the general law on the subject under consideration, or it must prevail.

It will be observed that in cases where the common-law rule has been changed by statute, language uniformly occurs which is so plain as to leave very little, if any, room for judicial construction,— such as "a majority of all the members entitled to seats in the county board" (subd. 1, sec. 670, Stats. 1898); or "a majority vote of all the members thereof" (sec. 697*a*); or "a vote of three fourths of all of the members" (ch. 270, Laws of 1885); or "a majority of the whole board" (*Cumberland Co. Sup'rs v. Webster*, 53 Ill. 141); or a "majority of the whole number of the members of the board" (*State ex rel. Cadmus v. Farr*, 47 N. J. Law, 208–216); or "two thirds of the members elect." While such expressions as "a majority vote of the house;" "two thirds of the house or branch" (*Green v. Weller*, 32 Miss. 650); "two thirds of each house" (*Southworth v. P. & J. R. Co.* 2 Mich. 287); "a majority of the corporation" (Morawetz, Priv. Corp. § 476); "adopted by a majority of the electors affected thereby,"— have been held to refer to a majority of a quorum or of such number of persons present as were empow-

ered to act. For an example of how strongly courts have adhered to the common-law rule, in the absence of unmistakable language indicating a contrary legislative intention, we may refer to *Craig v. First Presbyterian Church*, 88 Pa. St. 42, where language prohibiting a certain act "except in pursuance of the wishes of a majority of the members of such society or church, expressed at a church election," was held to be satisfied by a majority of the members of the society assembled at the election; and it was said, in substance, that if the legislature intended to require a majority of the whole society, or all the members of the society whether present at the meeting or not, that intention should have been expressed so clearly as not to be open to doubt; that, as it was fair to presume that the language, "a majority of the members . . . at a church election," only referred to a majority of those who should attend and vote at such election, such meaning must be presumed to have been what was intended by the legislature, and not that the general rule governing such matters should be superseded.

Applying the foregoing to the matter before us, it is the judgment of the court that the words "its board" point as clearly, at least, to the board as a legislative body, as to the individual members thereof. If the former was the legislative idea, then, obviously, a quorum of the members of the board was as much the board for the purpose of transacting public business as all the members thereof, and a majority vote of such quorum was a majority vote of the board.

That is sufficient for the appellant on this appeal. As reasoned in *Craig v. First Presbyterian Church*, *supra*, if it were the purpose of the legislature to abrogate the common-law rule and the general statute in the particular matter covered by the act, it was very easy to have said, "a majority of all of the members entitled to seats on the board," or to have used some other plain, unmistakable language to convey the idea. Having failed to do so, it is considered

that it is the plain duty of the court to hold that the words used were merely intended to express the purpose that the board — that is, an assembly for public business composed of a sufficient number of the members of the body to enable it to transact such business, by a majority vote thereof — must consent to the removal of a child from an orphan asylum, when once committed to its charge to be there supported in whole or in part at the expense of the county, as a condition precedent to such removal.

That renders necessary a reversal of the judgment appealed from and the rendition of a judgment in favor of the appellant.

By the Court.— The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

MICHELSON and others, Respondents, vs. PIERCE and others, imp., Appellants.

April 28 — May 15, 1900.

Corporations: Stockholders: Winding-up action: Debtor and creditor: Officers: Misfeasance and nonfeasance: Gratuitous service.

1. An action to wind up and settle the affairs of an insolvent corporation may be maintained by a stockholder, when it appears from the complaint that the relation of debtor and creditor exists between the corporation and the plaintiff, and it does not appear that the action results from the mere fact that plaintiff is a stockholder.
2. In an action by a creditor to wind up and settle the affairs of an insolvent corporation and enforce liability of officers for malfeasance and nonfeasance, the fact that it appears on the face of the complaint that a receiver of the corporation has been appointed in the same action, does not render the complaint demurrable.
3. An officer of a corporation is not relieved from liability to creditors of the corporation for acts of misfeasance and nonfeasance by reason of his services having been performed gratuitously.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

The defendants have appealed from an order overruling a demurrer to the plaintiffs' complaint. The purpose of the action sufficiently appears in the opinion.

For the appellants the cause was submitted on the brief of *Fish, Cary, Upham & Black* and *W. J. & J. H. Turner*, and for the respondents on that of *Joseph B. Doe.*

BARDEEN, J. This appears to be an action to wind up and settle the affairs of the Home Building & Loan Association, which has become insolvent and has ceased to be a going concern. The officers and directors of the association have been made defendants, under allegations charging them with gross mismanagement of the affairs of the company and gross violations of duty, by reason of which its funds and property have been lost and embezzled to a very large amount.

The first point made under the defendants' demurrer is that it appears that the plaintiffs "are prosecuting this action as stockholders." No doubt, there are allegations in the complaint from which it may be inferred that the plaintiffs are stockholders in the corporation; but this fact is no bar to their maintaining an action to wind up and settle its affairs, when it fairly appears that the relation of debtor and creditor exists. The complaint alleges that at the time the corporation became insolvent it was indebted to each of the plaintiffs in the several sums stated, and the necessary inference is that they sustained the relation of creditors to it at that time. In actions to dissolve corporations, the rule as stated in *Strong v. McCagg*, 55 Wis. 624, and *Hinckley v. Pfister*, 83 Wis. 64, is that a stockholder cannot maintain an action for that purpose; but, if the stockholder was at the same time a creditor, no reason is perceived why he may not enforce his rights as such, independent of his relation as

a stockholder. Whatever may be considered to be the purpose of this action, the objection mentioned is not available to the defendants, because the complaint shows the relation of debtor and creditor to exist, and does not show that it results from the mere fact that the plaintiffs were stockholders.

Nor does the fact that a receiver has been appointed in the action render the complaint demurrable. It does not seem necessary that the receiver should commence an independent action to enforce the liability of the officers and directors, and thus increase the expense of the litigation, when the same results may be reached in the action pending. The fruits of the litigation would go to the receiver for distribution under direction of the court, and the end of the law be accomplished without circuity.

It is further contended that the acts and omissions for which it is sought to hold the defendants liable were performed gratuitously, and that under the rule of *North Hudson M. B. & L. Asso. v. Childs*, 82 Wis. 460, they cannot be held. That case was decided upon the facts found after a trial. In this case there are allegations of misfeasance and nonfeasance which carry it beyond the facts there found, and are deemed sufficient, if proven, to render the defendants liable. There are also allegations of misrepresentation, voting and receiving unlawful dividends, and the like, which serve to distinguish the cases, and, if proven, would afford ground for a judgment requiring them to respond for the benefit of the corporation. No useful purpose will be served by any lengthy discussion of the grounds upon which the liability of officers and directors of a corporation will be sustained. Such liability can be best considered with reference to the actual facts of the case, found after trial.

Upon the grounds stated, we think the demurrer was properly overruled.

By the Court.—The order appealed from is affirmed.

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DAPPER, Respondent, vs. CITY OF MILWAUKEE, Appellant.

April 28 — May 15, 1900.

Municipal corporations: Injuries from defective sidewalk: Ice and snow: Proximate cause.

1. In the absence of structural defects which combine with the action of the elements in causing accumulations of ice and snow on a sidewalk, the condition of a sidewalk crossing an alley, which has become uneven by falling snow and the melting and freezing of the same while used by persons and teams, does not constitute an actionable defect.
2. Recovery cannot be had against a city for personal injuries happening through a fall on an icy sidewalk, where the plaintiff's evidence leaves the cause of the fall open to mere conjecture.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Carl Runge, city attorney, and *C. H. Hamilton*, of counsel, for the appellant.

For the respondent there was a brief by *O'Connor, Hammel & Schmitz*, and oral argument by *A. J. Schmitz.*

CASSODAY, C. J. This action is to recover damages for personal injuries sustained by the plaintiff about 9 o'clock in the forenoon of February 14, 1897, while on her way to church, traveling north on the sidewalk on the west side of Hanover street in Milwaukee, and while crossing a public alley, when she slipped and fell, and broke her left wrist, and otherwise injured herself. Issue being joined and trial had, the jury returned a special verdict, to the effect (1) that the plaintiff was injured by falling on the crossing of an alley on the west side of Hanover street, between Mineral and Washington streets, in Milwaukee, February 14, 1897; (2) that the ice and snow had accumulated or remained on the crossing at the place of the accident at the time of its occurrence in such a level, rounded, or uneven condition as

to constitute an obstruction or defect in the sidewalk, so as to render it unsafe and dangerous for persons using ordinary care to walk over the same; (3) and the same had continued in such condition for a week or more; (4) and such condition of the crossing was the proximate cause of the injury; (5) and such defective condition of such crossing had existed for so long a time prior to the injury that the defendant, through its officers and agents, in the exercise of ordinary care ought to have known of such defect, and could have remedied the same; (10) that the plaintiff was not guilty of a want of ordinary care which proximately contributed to the injury; (11) that the plaintiff was entitled to recover, and they assessed her damages at $600. From the judgment entered thereon for that amount and costs, the defendant brings this appeal.

The important question presented is whether the second and fourth findings of the jury are sustained by the evidence; in other words, Should the nonsuit have been granted, or a verdict directed in favor of the defendant, on the ground that the evidence failed to disclose any actionable defect in the sidewalk or negligence in the city? The testimony of the plaintiff is to the effect that she was seventy-one years of age at the time of the trial,— twenty-two months after the accident; that while walking very slowly and carefully to church, as stated, upon the wooden sidewalk across the alley, she "slipped and fell down backward," and broke her arm; that the ice and snow on that crosswalk were rough and uneven and slippery. A summary of the other testimony on the part of the plaintiff, as given by her attorneys, is to the effect that at the time and place where she fell the sidewalk crossing the alley was covered all over with lumpy, ridgy, rough, and uneven ice; that the ridges extending north and south on the crossing were from an inch to an inch and a half or two inches high, and three or four feet long; that the lumps were from one and a half to three inches

high; that the alley west of the crosswalk was higher than the walk and lower than the sidewalk, extending both north and south from the alley crosswalk; that the lumpy, ridgy, and uneven condition of the ice and crosswalk had existed for from three days to a week or more prior to the accident; that the planks of the crosswalk were decayed, and were in places entirely worn away, and that the crosswalk was lower than the surface surrounding it; that water would accumulate thereon during rainy seasons of the year, and when snow and ice would melt in the alley west of the walk and ground surrounding it; that when persons stepped on the rotten planks in passing over the same, or teams and wagons passed over the same, it would cause the water to squirt up from under and the side of the planks, and if the temperature was sufficiently low would cause ice to freeze on the crosswalk, in ridges and lumps, such as were on the crossing at the time of the accident; that such rough, uneven, ridgy, and lumpy ice was also formed by water oozing up from the ground under the planks of the crosswalk, between the rotten planks of the walk and through places where the planks were rotten and had worn away; that from January 17 until February 14, 1897, seventeen inches of snow fell; that February 15, 1897, there was on the ground only four tenths of an inch of snow; that from February 1 to 7, 1897, the temperature was never during any hour of these days less than 31° nor more than 39° Fahrenheit; that from February 7 until 13, 1897, the temperature was never higher than 33° nor lower than 17° Fahrenheit, it having reached the highest point February 12, 1897; that February 13, 1897, from 12 o'clock noon to 3 o'clock p. m., the temperature rose from 33° to 41° Fahrenheit, and from that time on it fell until it was at freezing point at 1 o'clock a. m., February 14, 1897.

We are all convinced that such evidence is insufficient to support the finding that the snow and ice at the time and

place of the accident had accumulated in such a manner as to constitute an obstruction or defect in the sidewalk, so as to render it unsafe and dangerous for persons using ordinary care to walk over the same, and especially is such evidence insufficient to support the finding that such condition of the crossing was the proximate cause of the plaintiff's injury. The facts bring the case squarely within the ruling of this court in *Hyer v. Janesville*, 101 Wis. 371. The most that the evidence shows is that the walk had thus become uneven by the falling of snow and the freezing and melting of the same while being used by persons walking over the alley and teams passing in and out of the alley. No substantial structural defect appears to have been combined with such action of the elements to produce such results; and, unlike several cases cited by my brother MARSHALL in the *Hyer Case*, the accumulations of snow and ice had not been to such an extent, nor of such a character, as to constitute an actionable defect. In most of the cases in this court where the action has been maintained for personal injury by reason of accumulations of ice and snow, the action of the elements had been combined with some defective condition of the walk itself,— as in the leading case of *Cook v. Milwaukee*, 24 Wis. 270, *S. C.* 27 Wis. 191. The evidence not only brings this case within the principles of the *Hyer Case*, but also within the principles of some of the cases therein cited and others which are here cited. *Grossenbach v. Milwaukee*, 65 Wis. 31; *Chamberlain v. Oshkosh*, 84 Wis. 289; *Hausmann v. Madison*, 85 Wis. 187; *Beaton v. Milwaukee*, 97 Wis. 416; *Cooper v. Waterloo*, 98 Wis. 424; *Kleiner v. Madison*, 104 Wis. 339; *De Pere v. Hibbard*, 104 Wis. 666; *Harrington v. Buffalo*, 121 N. Y. 147; *McNally v. Cohoes*, 127 N. Y. 350; *Lichtenstein v. New York*, 159 N. Y. 500. These New York cases, as well as our own, preclude a recovery in a case like this. Besides, in this case, as in the *Hyer Case* and some of the others cited, there is no direct evidence nor circumstances

from which it could reasonably have been inferred that the plaintiff's fall was caused by such ridges or accumulations of snow, instead of by slipping upon the smooth ice. *Salzer v. Milwaukee*, 97 Wis. 471; *Gagan v. Janesville*, 106 Wis. 662. The cause of the plaintiff's slipping and falling down backwards is left by her evidence to mere conjecture. A verdict in such a case cannot be sustained by mere conjecture. *Hyer v. Janesville*, 101 Wis. 377, and cases there cited.

By the Court.— The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

As to liability of municipal corporations for ice on streets or sidewalks, see note to *Hausmann v. Madison* (85 Wis. 187), in 21 L. R. A. 263.— REP.

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FITZGERALD, Respondent, vs. WALSH, Appellant.

April 28 — May 15, 1900.

Contracts: Mechanics' liens: Architects: Plans and specifications: Acceptance: Commencement of work: When lien attaches.

1. Plaintiff, an architect, agreed in writing with defendant to make plans and specifications for a building and superintend its construction for a stipulated price. After accepting the plans and specifications made, defendant abandoned the idea of erecting the building in accordance therewith, and ordered plaintiff to make new plans for an entirely different structure, which was done. *Held*, that the accepted order for the second set of plans constituted a new contract having no relation to the work done under the written contract, and did not preclude recovery of compensation for the second set in addition to the price agreed upon in the written contract.
2. The right to a mechanic's lien, under ch. 143, Stats. 1898, for work done in the construction of a building is not dependent upon whether a building is actually constructed, but whether such construction is commenced. If the latter circumstance occur, and lienable work be done in aid thereof, the right of lien thereby becomes perfect and cannot thereafter be defeated by any act of the proprietor.

3. Indebtedness from the proprietor and commencement of the work being the two things necessary, under sec. 3314, Stats. 1898, to give a right to a lien, an architect who makes plans and specifications for a contemplated building is entitled to a lien therefor, where the construction of the building according to such plans is commenced, although the use of them is abandoned before anything is done except a part of the excavation for the basement.

4. In an action to enforce a mechanic's lien, it appeared that plans and specifications made by plaintiff for a contemplated building, after delivery to defendant, were used by him in negotiating with contractors and in setting stakes indicating the boundaries, and that thereafter part of the excavating for the basement was done before the use of the plans was abandoned. *Held*, that there had been an acceptance of the plans, which, with the commencement of the construction of the building, gave plaintiff a lien thereon.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Action to enforce a claim for a lien for architect's services under the statutes in relation to the liens of mechanics and others. The complaint was in the usual form, except that it stated that the plaintiff's services were performed in making plans and specifications for a building *to be* erected, without the usual allegations showing actual work upon the building. Defendant answered, putting in issue, in the main, all the material allegations of the complaint. The controverted facts on the evidence were as regards the nature of the contract under which plaintiff's services were performed and the amount of the indebtedness which accrued for such services. On those questions the court signed findings to the effect that it was agreed between plaintiff and defendant that the former should prepare plans and specifications for a building to be erected on the premises described in the complaint and superintend the erection of such building for $1,000; that plaintiff fully performed his part of such agreement as to the making of plans and specifications, and that the work was fully accepted by the employer; that defendant thereafter abandoned the idea of erecting a building

according to such plans and specifications, and ordered plaintiff to make new plans and specifications for an entirely different kind of structure; that plaintiff fully complied with such order; that his work was accepted by the employer and the excavation for the building commenced in accordance therewith; that the reasonable value of plaintiff's work was $1,400, no part of which has been paid. There were sufficient findings as to the filing of the lien claim and the commencement of the action. A lien judgment in plaintiff's favor was rendered in accordance with the statutes on the subject of liens of mechanics and material men, the amount due plaintiff being fixed at $1,400 and interest, from which this appeal was taken.

For the appellant there was a brief by *Timlin, Glicksman & Conway*, and oral argument by *Nathan Glicksman.*

For the respondent there was a brief by *J. M. Clarke* and *P. J. Somers*, and oral argument by *Mr. Clarke.*

MARSHALL, J. Three questions are presented for consideration on this appeal: (1) What was the indebtedness of defendant to plaintiff for the work rendered by the latter, mentioned in the complaint? (2) Is an architect entitled to a lien, under sec. 3314, Stats. 1898, for compensation for making plans, specifications, and estimates for a contemplated building upon the land of another, if the construction of the building, pursuant to such plans, be commenced, though the use of them be abandoned before anything is done except a part of the excavating for the basement? (3) Was the construction of the building commenced according to the plans and specifications furnished by plaintiff?

1. Appellant's counsel contended that, respondent having agreed in writing to make plans and specifications for the building and to superintend its erection for the stipulated price of $1,000, an express contract was necessary to give him a legal claim upon the appellant for services rendered

without objection, not included in such contract, basing such contention on the rule governing the relations of master and servant and that between an officer of a corporation and his principal in regard to personal services. Such rule does not apply to a situation of the kind in question. It is well settled that where a builder is ordered to make changes from the original contract plans, which are really extras, or to do work in some way connected with the original contract but substantially independent of it, and the circumstances are such that the proprietor must know that the execution of such orders will cause extra labor and expense to the builder not contemplated by either party in the original contract, he is liable to compensate the builder therefor in the absence of some express provision in such original contract to the contrary. The rule is stated in 1 Hudson, Building Cont. (2d ed.), 358, citing *Gibbons v. United States*, 15 Ct. Cl. 174, thus: "Where a change in the contract is ordered amid circumstances which imply or warrant the belief that no extra cost will result from the change, it is the duty of the contractor to notify the other party that he cannot make the change without extra price. But where a change is ordered which must necessarily cause increased expense, no such notice is necessary." Such work cannot be said to have been in contemplation by the parties at the time of making the contract for the construction of the building. There was no meeting of minds on that subject. So the doing of such work when ordered, without objection, cannot reasonably be said to be voluntary and without expectation of compensation if the expense to the builder is thereby necessarily materially increased. In such circumstances an implied promise arises to pay for the extra or independent work, in the absence of anything in the contract to the contrary. *Boody v. R. & B. R. Co.* 24 Vt. 660, 665; Wait, Engineering & Arch. Jur. 490; *Escott v. White*, 10 Bush, 169.

Now the trial court found, on such evidence that the find-

ing cannot be disturbed, that respondent, pursuant to his contract with appellant, made complete plans and specifications for a building to be erected on appellant's premises, and that they were accepted. That branch of the contract was thereby fully executed. Respondent did not agree to make all plans and specifications appellant might order in contemplation of the construction of a building, but to make plans and specifications for the proposed building. The only reasonable, sensible construction of that language is that it called for one set of acceptable plans and specifications. That being satisfied, the acceptance of an order for another set was neither within, nor a mere extra, incidental to, the original contract.

The accepted order for the second set of plans was rightly decided by the trial court to constitute a new contract having no relation to the work under the written contract, and not governed thereby except as to the price for the new work. Nothing having been said about compensation therefor, it was fair to presume, as the trial court did, that both parties contemplated that it would be paid for at the same rate as the original work of the same nature, called for by the writing.

It is considered that there were two separate and distinct contracts in this case as plainly as there was in *Hand v. Agen*, 96 Wis. 493. The first contract, exclusive of the work of superintending the construction of the building, having been fully executed, the rule announced in *Boody v. R. & B. R. Co.* 24 Vt. 665, applies: "Where the parties [under a special contract] deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as a work wholly extra, out of the scope of the contract, and may be recovered for as such."

We do not understand that, conceding the above theory

to be correct, it is claimed that the amount of the indebtedness of appellant to respondent was placed too high by the trial court. In any event, the finding in that regard is well supported by the evidence.

2. The right to a lien under ch. 143, Stats. 1898, for work done in the construction of a building, is not dependent upon whether a building is actually constructed, but upon whether such construction is commenced. If the latter circumstance occur, and lienable work be done in aid thereof, the right of lien thereby becomes perfect and cannot thereafter be defeated by any act of the proprietor. The language of sec. 3314 is that the lien for work done in the construction of a building shall be prior to any other lien which originates subsequent to the commencement of such construction. Sec. 3321 provides for joining in one action all claims on the property affected. Sec. 3324 provides that the judgment shall direct a sale of all the right, title, and interest which the owner had in the property at the time of the commencement of the work. And sec. 3325 provides for the distribution of the proceeds of a sale made pursuant to the judgment, among all the lien claimants without priority, clearly indicating that, without reference to when the indebtedness of the respective lien claimants on the same property accrued, if there be several and the liens be for work done or material furnished in the construction of a building, they shall all attach at the same time; that is, at the time of the commencement of the construction. That was decided to have been the legislative intention in *Vilas v. McDonough Mfg. Co.* 91 Wis. 607, where it was held that the right of lien for machinery manufactured and furnished for a sawmill after the commencement of the construction of the mill building, related back and attached to the property at the time of the commencement of such construction, regardless of when work commenced on the machinery at the factory or when it was attached to such building, and took prece-

dence of a mortgage placed on the property in the meantime.

Statutes similar to ours exist in Indiana, Kansas, Maryland, New Jersey, and other states, and have been construed there as in *Vilas v. McDonough Mfg. Co.*, the courts in some instances remarking that such statutes evidence the intent indicated so plainly as to leave no room for judicial construction. *Kansas M. Co. v. Weyerhaeuser*, 48 Kan. 335.

So these two things only are necessary to respondent's right of lien: indebtedness of appellant to him for work done, that appellant knew or ought to have known respondent supposed was on account of a building to be presently, or in the near future, constructed; and the commencement of such construction. If the construction of the building the plans were made for was actually commenced, according to such plans, the lien then attached and could not thereafter be defeated by any act on the part of appellant. The principle applies, that if a person sell material for use in the construction of a building, and such construction be commenced so that a lien may attach to the property, the seller is entitled to his lien thereon, whether such material be actually used in the building or not. *Esslinger v. Huebner*, 22 Wis. 632; *Spruhen v. Stout*, 52 Wis. 517. That is in perfect harmony with *Foster v. Tierney*, 91 Iowa, 253, relied upon by appellant. The trouble there was that the construction of the building was not commenced, so the lien, necessarily, could not attach.

3. There is left to be considered the question of whether the building was commenced pursuant to accepted plans furnished by respondent. We use the term "accepted plans" only because such plans were essential under the contract to entitle respondent to compensation for his work. On the subject of this last question, we cannot say the finding of the trial court is against the clear preponderance of the evidence. The commencement of the excavation was the

commencement of the building within the meaning of the statute. There is abundance of evidence of that having occurred after the plans were accepted and before respondent was notified that they would not be used. Commenting on statutes similar to ours, and quoting from judicial authority, it is said in Jones, Liens, § 1309*b*: "The foundation of a house or barn constitutes a building within the meaning of the statute giving a mechanic's lien upon a building and upon the lot of land upon which it stands. It is immaterial that the building was never erected or was never completed, or that the purpose to erect it was abandoned. Laborers and materialmen who are employed to do work or furnish material, with the purpose of the employer, then formed, to continue the work to the completion of a building for which the foundation is thus being prepared, are entitled to acquire a lien under the statute." In *Brooks v. Lester*, 36 Md. 65, it was said that the commencement of a building "is some work or labor on the ground, . . . such as beginning to dig the foundation or work of like description, which every one can readily see and recognize as the commencement of a building." In *Mutual Benefit L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389, the following language was used: "The legislature intended to make the actual and visible commencement of the building notice to all who might propose either to purchase or acquire liens upon the property. . . . The excavation for the foundation is such notice." To the same effect are *Thomas v. Mowers*, 27 Kan. 265; *Pennock v. Hoover*, 5 Rawle, 291; *Scott v. Goldinghorst*, 123 Ind. 268; *McCristal v. Cochran*, 147 Pa. St. 225.

In the last two cases cited it was held, in effect, that if the excavation for the foundation be commenced, the building is commenced, and there is a building within the meaning of the lien statute, and lienable claims will attach to the property and remain liens thereon till discharged by fail-

ure of the lien claimants to enforce them, or by payment thereof.

Guided by the foregoing, the finding of the court that the building which the plans in question were made for was commenced pursuant thereto, was based on the following: Plaintiff testified that he delivered the completed plans and specifications to *Mr. Walsh*, who thereafter had them at his office and used them in negotiating with contractors. There was evidence tending to show that a Mr. Shea was employed by *Walsh* to make the excavation; that Shea obtained from his employer a section of the plans and delivered it to the city engineer for use, and that it was used by such engineer in setting the stakes to indicate the boundaries of the foundation; that the engineer afterwards did his work over at the special request of *Walsh*, who furnished him a section of the plans; that such section was delivered by the engineer to *Fitzgerald;* that *Walsh* subsequently called on *Fitzgerald* for that part of the plans; that Shea did over 1,000 yards of the excavating work, largely, if not all, prior to January 21, 1899; that on such day *Walsh* sent the plans back to *Fitzgerald*, indicating that he did not intend to make any further use of them; and that such event was preceded, by a few days only, by a rupture between *Walsh* and *Fitzgerald*, and a refusal by the former to pay the latter anything on account of his work, and the employment by the latter of attorneys to seek redress in the courts.

In view of that state of the record, we cannot say the trial court was not warranted in deciding that the building for which the respondent prepared the plans and specifications was actually commenced, and that his right of lien attached to the improvement, as a building, in contemplation of the lien statute, and to all the right, title, and interest of the owner at the time of the commencement of the construction of such building, which could not thereafter be extin-

guished by any act of the appellant except by payment of the claim.

The foregoing renders it unnecessary to consider any other question presented by the appellant. It requires the affirmance of the judgment appealed from.

By the Court.—So ordered.

KAMMERMEYER, Respondent, vs. HILZ and another, Appellants.

April 28—May 15, 1900.

Action, at law or in equity? Settlement for seduction of daughter: Rights of father and daughter in money paid: Death of child: Parol evidence: Receipts.

1. After the seduction of plaintiff by P. a settlement was made, whereby, for a gross sum paid by P., the claims of plaintiff and her father were released, and the obligation of P. to support the child born to plaintiff was assumed by her father. The money was all paid to the father. *Held*, that an action by the daughter against the father, to determine and recover the part thereof to which she was entitled, is an action at law, but maintainable on equitable principles.
2. A father and daughter having settled, for a gross sum paid the father, all their claims against P. for the seduction of the daughter, and the father having by such settlement agreed with P. to support and maintain the child born to the daughter, the fact that the child died soon after does not increase the amount the daughter is entitled to: she is only entitled to such portion of the money paid, as, in the contemplation of the parties, was paid in satisfaction of *her* claim.
3. The memorandum of settlement with P. being in writing, admission of the testimony of P. to the effect that the money was paid over for the benefit of the daughter was error.
4. In the absence of fraud or mistake a payment cannot be shown to relate to a subject matter different from that stated in the receipt given therefor.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The complaint sets out that the defendants in April, 1891, received from one Priest the sum of $2,850, to the use of the plaintiff. The answer of the defendant *Adam* alleges that the plaintiff is the daughter of the defendants; that while under age she was seduced by Priest; that he commenced a suit to recover his damages for such seduction; that Priest paid $3,000 in settlement of the suit, and $200 was paid for attorney's services; that plaintiff had no claim thereon and was not entitled to any part thereof. The other defendant, who is the wife of *Adam*, denied that any part of said money was ever received by her.

The action came on for trial before the court and a jury. The proof showed: That plaintiff was the child of defendants, born before wedlock, on March 29, 1870. While working for one Priest she was gotten with child, which was born December 25, 1890. The defendant *Adam* employed an attorney to bring a suit for such seduction, and after some negotiations the matter was settled without suit by Priest paying $3,000 in full for all claims of either plaintiff or defendants, $2,850 of which sum was paid to the defendant *Adam*. At the time of this settlement, Priest and *Hilz* entered into a contract by which the latter agreed to care for, bring up, and maintain the plaintiff's bastard child, to educate, clothe, and support it in a suitable manner, and save Priest harmless from all claims on account thereof. At the same time *Hilz* executed and delivered a bond to secure the performance of this agreement, in the sum of $2,000. As a part of the same transaction the plaintiff and the defendants executed and delivered to Priest a receipt under seal, in which, in consideration of the sum of $3,000, they acknowledged settlement in full for all demands of either party arising out of the seduction, birth of child, loss of service, and the care, support, and education of the child. The child died about four months afterwards. The proof showed that *Hilz* carried out the terms of the contract men-

tioned on his part. In 1895 the plaintiff made claim against her parents for this money. At that time defendants paid plaintiff $600, and took a receipt which recited that it was payment in full of any claim which the plaintiff had, "or may have after their death, as heir."

After the evidence was all in, the court announced that he had come to the conclusion that "this money was put out in trust, not for the woman, but for the child," and thereupon he prepared and submitted a special verdict, which, with the answers of the jury, is as follows: "1. Did A. W. Priest on or about the 25th day of March, 1891, pay to the plaintiff and the two defendants the sum of $3,000, less attorney's fees, leaving the balance of $2,850, the amount which they actually received; and did they, in consideration of said payment, discharge, release, satisfy, and acknowledge full payment and satisfaction of, all damages, claims, and demands, settled or unsettled, liquidated or unliquidated, accruing or that might thereafter accrue, arising or that might thereafter arise, by reason or growing out of the plaintiff, *Catherine Kammermeyer* (then Hilz), having been begotten with child by the said A. W. Priest, which child was then living, and for the seduction of the said *Catherine*, and for having carnal intercourse with the said *Catherine*, and for the loss of her services; and was it provided in said receipt that it should cover and include all claims, demands, damages, and causes of action of every kind and nature which the plaintiff and the defendants, or either of them, had against the said A. W. Priest by reason of the aforesaid, and his (Priest's) relations with said *Catherine Kammermeyer*, formerly Catherine Hilz, and so begetting her with child, including the rearing, bringing up, educating, maintenance, and support of the said child of said *Catherine Kammermeyer*, formerly Catherine Hilz, and said A. W. Priest? *A.* (*by direction of the court*) Yes. 2. Did the defendants receive said money and appropriate and use

it as their own money? *A.* (*by direction of the court*) Yes. 3. Did the said child of the plaintiff and the said A. W. Priest die when the same was about six months old? *A.* (*by direction of the court*) Yes. 4. Did the plaintiff intermarry with one Joseph Kammermeyer on or about the 7th of December, 1893, and has she from that time forward lived with her said husband? *A.* (*by direction of the court*) Yes. 5. Taking into account all that the defendants did for the plaintiff and for her said child after the birth of said child and immediately prior thereto, and the loss of her services, also taking into account her seduction, and all advances and payments made to her by the defendants, and all the other facts and circumstances of the case as disclosed by the evidence, what proportion of the said $2,850 should, in equity and good conscience, be retained by the defendants, and what proportion should be paid to the plaintiff by them? *A.* Defendants, $520; plaintiff, $2,330. 6. Was the receipt of March 23, 1895, given to *Adam* and *Catherine Hilz*, the defendants in this action, by *Mrs. Katie Kammermeyer*, for $600, given and intended and received in discharge of the plaintiff's claim upon the money paid to the defendants by said A. W. Priest? *A.* No."

The defendants moved to set aside the verdict, which motion was denied. Thereupon the court made findings of fact and conclusions of law, adopting the findings of the jury in the special verdict, and in which he directed judgment for the plaintiff for $2,330 and interest, amounting in all to $3,203.75, besides costs against both defendants. The defendants filed numerous exceptions to the judge's charge and to the findings, and bring the action here for review on an appeal from the judgment.

J. C. Officer, for the appellants.

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood* and *Whitman & Ryan*, attorneys, and *Wheeler P. Bloodgood*, of counsel, and oral argument by *A. B. Whitman* and *Wheeler P. Bloodgood.*

BARDEEN, J. This case presents some very novel features. The complaint shows that it is a straight action at law for money had and received. After the evidence was all in, the court conceived the idea that it was an action to enforce a trust, and thereupon, against defendants' objections, submitted special findings to the jury, and made findings of fact and conclusions of law as in an ordinary equity suit. If the conclusion that this is an action to enforce a trust can be justified, still there was no warrant in our practice for turning the case into an equitable proceeding, against the defendants' objection. The evidence introduced was proper, under the complaint, to establish the claim for money had and received. Hence no question of waiver by failure to object thereto can be invoked. There are cases in which evidence has been received without objection which has virtually changed the action from law to equity, and the judgment has been sustained on the ground of waiver and failure of the party to make timely objection. This is not such a case. But the fact of whether the court has or has not the power to make such transformation is not important in this case, because we are clearly of the opinion that the view taken of it by the trial court was erroneous. The evidence fails entirely to disclose a trust, and hence the action of the court in parceling up the issue was distinctly prejudicial to the defendants, and the result is a mistrial. The status of the parties and their legal liability to each other was fixed, and must be determined, by the written contract, bond, and receipt executed when the transaction was closed. Prior to the alleged seduction the plaintiff had been a member of the defendants' family, and had been recognized and treated as a daughter. No question seems to be raised but that the relation was sufficient to sustain a claim for the seduction. Under these circumstances, the father had a claim against Priest, which included loss of services of the plaintiff, she being under age; expense incurred by reason of the preg-

nancy and confinement, or other illness; the anxiety and suffering of mind caused by the loss of virtue of his daughter; the corrupting influence upon the morals of his other children; and the disgrace and dishonor to his family. 21 Am. & Eng. Ency. of Law, 1031. In addition, under the terms of the settlement, the defendant *Adam* took upon himself the burden of bringing up, rearing, educating, and supporting the child, and agreed with Priest to save him harmless from all claims or demands in that regard. From the very nature of the situation, the amount of this burden was uncertain and unascertainable, and depended upon the contingency of the child living, its condition of health, and other circumstances as uncertain as life itself. As a part of the same settlement, the plaintiff released to Priest all claim or demand she had against him. As the father of the child, Priest was bound to provide for its support and maintenance. The claim of the mother arose from the necessity of caring for the child, giving it motherly care, and looking after its comfort, and Priest was under a high moral obligation to make her future as easy in that regard as was consistent with his circumstances.

Sec. 1532, Stats. 1898, recognizes the right of the person accused of being the father of a bastard child to settle with the complaining female by paying or securing to be paid to her "such sum of money or other property as she may agree to receive in full satisfaction" of her wrongs. The accused is also required to enter into bonds to save the authorities harmless from all charges for the maintenance of the child, and for the lying-in and support and attendance of the mother during her sickness. Independent of the statute, the female had no cause of action against her seducer, but under it she was entitled to demand such sum as she might agree to receive in satisfaction of her wrongs. The settlement in this case included the father's claim for seduction, the obligation of the accused to support and maintain the

child, and the mother's claim for satisfaction, all bunched into one sum. The money was paid over to the father, and held by him. The receipt taken, which, by the way, must be treated as a contract, recites that, in consideration of the sum of $3,000, the signers released Priest from all of the claims above mentioned, and which was to be in full satisfaction and release of all claims of either party upon him for the seduction, carnal intercourse, loss of services, expenses, and support and education of the child. The receipt, however, fails to designate how much of said sum was to be applied to the satisfaction of either of the claims mentioned. As her natural guardian, the father took the share given to the daughter. She was entitled to some share of the money, and the purpose of this action was to ascertain how much that share was. An action of this kind has always been considered an action at law, but is maintainable on equitable principles. *Western Ass. Co. v. Towle*, 65 Wis. 247. The plaintiff was therefore entitled to recover such share of the money paid to her father as, under all the circumstances of the case, she was justly entitled to. It was a question for the jury to determine, under proper instructions, and not for the court. The father had a right to retain all his damage for the seduction, including the elements, hereinbefore stated, of expense, loss of services, sense of shame and humiliation, and the like, and also such sum as the jury might find the parties contemplated might be required for the support and education of the child, had it lived. The father entered into a contract and bond to take care of the child, and the fact that it died a few months afterwards does not increase the amount the plaintiff is entitled to. The mother is entitled to such portion of the money paid over as, in contemplation of the parties, was paid in satisfaction of *her* claim, and no more. There being nothing in the written contract of settlement to show the share of each, evidence to show the entire situation was

proper, in order to give the jury some basis upon which to found a conclusion.

The evidence of Priest to the effect that the money was paid over for the benefit of the mother was improper, as varying the terms of the written contract of settlement. In the absence of fraud or mistake, that instrument must speak for itself. As indicated by the special verdict and the instructions of the court, the case was submitted to the jury upon an entirely different and erroneous theory.

It was claimed by defendants that, after the plaintiff had made a demand for a portion of this money, they paid to her the sum of $600 in satisfaction of her claim. A receipt was taken, which reads as follows:

"Received from *Adam* and *Catherine Hilz* six hundred dollars, being in full payment of any claim which I have, or may have after their death, as heir.

"MRS. KATIE KAMMERMEYER."

On its face it relates to an entirely different matter, and, unless it was clearly shown that there was some mistake or fraud in the writing, it was conclusive on the parties. *Brand v. James*, 67 Wis. 541.

What has been said is deemed sufficient to indicate the plan that should be pursued upon a new trial.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ADAMS, Appellant, vs. SAVERY HOUSE HOTEL COMPANY, imp., Respondent.

April 30 — May 15, 1900.

Wrongful attachment: Liability of creditor: Appeal: Evidence: Assertions of counsel.

1. The plaintiff in attachment proceedings is not liable for the acts of an officer in levying upon property of a stranger to the writ, where it is not shown that he instigated such levy or ratified it with knowledge.
2. In order to warrant an inference of approval of such a levy by the attaching creditor from acts of attorneys in assisting in the execution of a bond for the release of the goods levied upon, the evidence must show that the attorneys were attorneys for such creditor in the attachment proceedings; and assertions to that effect, made on appeal by attorneys for the plaintiff in an action for the conversion, cannot be accepted as a substitute therefor.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This was an action in trover for conversion. The plaintiff's evidence tended to prove that on the 24th day of October, 1895, the American Burlesque Company executed to the plaintiff a chattel mortgage upon "all the scenery, properties, and costumes of the play, 'Little Robinson Crusoe,'" the grantor reserving the right to move said property from place to place, and state to state, as might be necessary to fill its dates and contracts made and to be made for the presentation of said play. The property was then in the Davidson theater, in Milwaukee, and being used in the presentation of said play. The mortgage was duly filed with the city clerk of Milwaukee at 3:45 p. m. of that day. Afterwards, but apparently on the same day, the plaintiff took possession, through one Godenrath, as his agent, who was the treasurer of the American Burlesque Company, accompanying the traveling troupe engaged in presentation of the play known

as Little Robinson Crusoe. The use of the property apparently continued as before.

On October 26th a writ of attachment was sued out by the defendant *The Savery House Hotel Company*, in a suit against Thomas W. Prior, Max Godenrath, and the Little Robinson Crusoe Company, and placed in the hands of a constable, who returned that by virtue thereof he levied and attached $108.66 in money and the scenery and curtains of the Little Robinson Crusoe Company, "but the property so attached was released and returned upon receiving the bond herewith returned." The bond was in the ordinary form for release of property on attachment. The scenery and curtains were part of the property covered by said chattel mortgage.

A witness testified: "I do not think the constable took the property away from the Davidson theater. I think it was turned over to Mr. Paulsen on Mr. Paulsen's giving a bond. It never was returned to *Mr. Adams*. All I know is that this writ of attachment was served, and Mr. Paulsen gave a bond. It was turned over to Mr. Paulsen, and he took possession of it and removed the property from the city on Saturday night, October 26th." This was substantially all the material evidence offered by the plaintiff.

At the close of his evidence, judgment of nonsuit was entered, from which the plaintiff appeals.

For the appellant there was a brief by *C. H. Hamilton*, attorney, and *W. J. Turner*, of counsel, and a brief in reply and oral argument by *Mr. Hamilton*.

For the respondent the cause was submitted on the brief of *Sylvester, Scheiber & Orth*.

Dodge, J. Should it be conceded, as the appellant contends, on authority of *Wintringham v. Lafoy*, 7 Cow. 735, that a conversion was complete upon the mere levy of the attachment, still that conversion was committed by the con-

stable. There is no evidence that the defendant or the defendant's attorneys instructed the constable to levy on the specific property claimed to belong to, and be in the possession of, the plaintiff. There is, indeed, no evidence as to how the writ of attachment came to the constable's hands; but, if it were conceded that it so came to his hands from either the defendant or its attorneys, still from that act alone no liability for the conversion would be cast upon the defendant. The delivery of the writ would authorize the execution of it only by levy upon the property of the debtors named therein, not upon the property of others. Drake, Attachment (7th ed.), § 196; *Welsh v. Cochran*, 63 N. Y. 181; *Clark v. Woodruff*, 83 N. Y. 518, 525; *Bowe v. Wilkins*, 105 N. Y. 322, 331; *Russell v. Walker*, 150 Mass. 531. It is doubtless true that, if the constable do levy upon the property of another, the plaintiff may be liable therefor if he instigate such levy or ratify it with knowledge; but the record is barren of evidence of any act whatever, by the defendant in this action or its attorneys, either before or after the levy was made. True, counsel contends that some inference of approval and co-operation may be drawn from the fact that defendant's attorneys witnessed, and one of them, as notary, took the verification of, the release bond; but even that fact does not appear. Nowhere in the record is it shown that the same persons who now appear as attorneys for the defendant in this action appeared or acted for it in the attachment proceedings, and we cannot accept the assertion now made by appellant's counsel, that the M. M. Riley and Charles A. Orth who witnessed the release bond were attorneys for the *Savery House Hotel Company* in that proceeding, as a substitute for evidence on that subject, even if that fact were material. In such state of the evidence, no recovery as against the defendant in this action could have been justified, and the judgment of nonsuit was proper.

By the Court.— Judgment affirmed.

HARING, Receiver, Respondent, vs. HAMILTON and others, Appellants.

April 30 — May 15, 1900.

Pledge: Voluntary assignment: Fraudulent conveyances: Intent: Corporations: Misconduct of officers: Liability of pledgee of stock.

1. An assignment and transfer of stock in a corporation to an attorney as trustee for a creditor of the transferrer, with the understanding and agreement that any surplus remaining in the hands of the trustee after payment of the creditor's claims should be immediately returned to the transferrer by the trustee, is merely a transfer as collateral security by way of pledge, the surplus, if any, remaining the property of the pledgor.
2. A debtor pledged practically all his property to an attorney as trustee for the debtor's wife to secure a debt substantially less than the value of such property. *Held*, that the transaction did not constitute an assignment for the benefit of creditors, since the pledgor still retained a valuable interest in the property, which was subject to execution under sec. 2988, Stats. 1898.
3. An intent to defraud creditors cannot be inferred from the fact that an insolvent debtor, by paying or securing one creditor, necessarily prevents other creditors from receiving anything or as much as they would otherwise receive.
4. The pledgee of practically all the stock in a corporation is not liable for depreciation in the value of the corporate property due to the giving of a mortgage on the corporate property, by its officers, in violation of an injunction against the corporation.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

C. H. Hamilton, for the appellants.

For the respondent there was a brief by *Haring & Frost*, attorneys, and *John F. Burke*, attorney for Edgewood Distilling Co., and oral argument by *C. I. Haring.*

CASSODAY, C. J. On July 3, 1897, Waldheim & Wittenberg obtained a judgment against the defendant *S. R. Miller* for $203.61. *Miller* appealed from that judgment to this court, and the same was affirmed October 22, 1897 (*Wald-*

heim v. Miller, 97 Wis. 300). After the *remittitur* had been filed in that case, execution was issued on that judgment November 29, 1897, and returned December 3, 1897, as wholly unsatisfied. Thereupon, and on or about December 16, 1897, proceedings supplementary to such execution were commenced, and resulted in the appointment of the plaintiff, *Haring*, as receiver therein, March 17, 1898. Pursuant to an order of the court made April 16, 1898, this action was commenced by the plaintiff as such receiver to reach and recover for the benefit of creditors 148 shares of stock, of the lawful value of $100 each, which had been issued by the Sam R. Miller Company to the defendant *Samuel R. Miller*, and by him transferred to the defendant *Charles H. Hamilton* as trustee or attorney for *Katie B. Miller*, wife of *Samuel R. Miller*, and to set aside such transfer as having been made with intent to defraud the creditors of *Samuel R. Miller*. The defendants *Charles H. Hamilton*, *Samuel R. Miller*, and *Katie B. Miller* severally and separately answered to the effect that such transfer of such stock was made to secure a *bona fide* indebtedness due from the defendant *Samuel R. Miller* to his wife, *Katie B.*

Upon the trial of the issues thus formed there were found, in effect, the facts stated, and that September 4, 1897, the Sam R. Miller Company was incorporated and organized under the laws of this state, with a capital stock of $15,000, divided into 150 shares, of $100 each; that on that day *Samuel R. Miller* turned over and conveyed to that corporation all of his tangible property, consisting of stock in trade, store fixtures, book accounts, and assets, and received in exchange therefor the 150 shares of capital stock mentioned, of which 148 shares were issued directly to him, and one share to his brother John C. Miller, and the other share to one H. R. Johnson; that September 7, 1897, *Samuel R. Miller*, as the sole owner thereof, conveyed the 148 shares of such stock so held by him to the defendant *Charles H. Hamilton*,

as the trustee for the defendant *Katie B. Miller*, with the understanding and agreement that, in case any surplus should remain in the hands of such trustee after paying her claims against *Samuel R. Miller*, such surplus should be immediately returned to *Samuel R. Miller* by such trustee; that such stock constituted all the property of any value then owned by *Samuel R. Miller;* that at the time of such transfer *Samuel R. Miller* was indebted to a number of other persons besides his wife, in large amounts of money, and was insolvent, and knew that he was insolvent, and such stock was received and accepted by *Hamilton* and *Katie B.* with knowledge of such insolvency, and such conveyance of stock was so made and accepted by the defendants for the purpose and with the intention of hindering, delaying, and defrauding his other creditors, including Waldheim & Wettenberg and the Edgewood Distilling Company, a corporation, which had duly intervened herein and had become a party to this action July 9, 1898, and held and owned a judgment duly recovered against *Samuel R. Miller*, March 8, 1898, for $443.72, and that such transfer was so made for the purpose of giving *Katie B. Miller* a preference over the other creditors of her husband; that at the time of such transfer *Samuel R. Miller* was indebted to his wife, *Katie B.*, in the sum of upwards of $7,734.93 and interest, evidenced by two certain promissory notes, one for $4,734.93, dated September 30, 1893, bearing seven per cent. interest, and the other for $3,000 and interest; that from and after the time of such transfer, and ever since September 7, 1897, *Samuel R. Miller* has been exercising certain rights of ownership over the stock, with the knowledge and consent of *Charles H. Hamilton* and *Katie B. Miller*, and has continued to act as a stockholder and officer of the corporation; that *Samuel R. Miller* was duly enjoined from conveying and interfering in any way with such capital stock and any of his property at the time of the appointment of such receiver, and that sub-

sequently *Katie B. Miller* and *Hamilton* were also enjoined and restrained from transferring such stock and the property represented thereby, and all property mentioned in the pleadings in this action, or in any way interfering with, disposing of, or conveying the same, or making any changes in the property or the instruments or certificates representing the same, which injunctional order was still in effect; that August 5, 1898, while the Sam R. Miller Company was so enjoined, he, acting as president of the company, signed and executed what purported to be a chattel mortgage to secure the payment of $2,500 to Friedman, Keiler & Co., of Kentucky, on which $600 was subsequently paid; that since the commencement of this action the 148 shares of capital stock mentioned had largely depreciated in value, in at least the sum of $1,900, on account of such chattel mortgage incumbrance, which depreciation resulted from the acts and laches of the defendants; that immediately after the appointment of the plaintiff as receiver, and before the commencement of this action, to wit, March 21, 1898, the receiver duly demanded the return of such shares of stock, and gave due notice of his appointment as receiver, but the defendants refused to deliver such stock to the plaintiff as such receiver, and the defendant *Hamilton* has ever since held, and still continues to hold, such certificates of stock.

As conclusions of law, the court found, in effect, that such transfer of stock by *Samuel R. Miller* to the defendant *Hamilton* as trustee for *Katie B. Miller* was fraudulent, and amounted to a voluntary assignment with unlawful preferences, and that such assignment was void and contrary to the statute in such case made and provided; that the plaintiff, as receiver, was entitled to the relief prayed, and the return of the 148 shares of capital stock mentioned, for distribution under the order of the court; that *Katie B. Miller* was liable to the plaintiff, as such receiver, for the depreciation which had taken place in the value of such 148 shares

of stock since March 21, 1898, which was thereby fixed at $1,900,—and ordered judgment to be entered in favor of the plaintiff, as receiver, against the defendants, for the immediate transfer and delivery of the 148 shares of stock by the defendants *Hamilton* and *Katie B. Miller* to the plaintiff, and, further, a judgment against *Katie B. Miller* for $1,900 damages for depreciation of stock, and for the costs and disbursements of this action.

From the judgment entered upon such findings accordingly, the defendants appeal.

It is practically undisputed that September 4, 1897, the defendant *Samuel R. Miller* was the owner of two saloons in Milwaukee; that the aggregate stock in trade, furniture, fixtures, book accounts, and assets of both establishments were of the nominal value of $21,000, and that the fair cash valuation of the same was about $15,000; that at that time the corporation known as the Sam R. Miller Company was incorporated and organized under the laws of this state; that the capital stock of such corporation was $15,000, divided into 150 shares, of $100 each; that thereupon *Samuel R. Miller* conveyed and transferred to such corporation all of such property of both such saloons in consideration of 150 shares of such stock, of which 148 shares were duly issued to *Samuel R. Miller*, who was elected president thereof, one share thereof to his brother John C. Miller, who was elected secretary thereof, and the other share thereof to H. R. Johnson, who was elected vice president thereof; that the defendant *Hamilton* had been attorney for *Samuel R. Miller*, and drew the articles of incorporation of the company, and superintended the organization of the same; that at that time *Samuel R. Miller* was indebted to his wife, the defendant *Katie B.*, for borrowed money which he had used in his business, which the court finds to have been upwards of $7,734.93, evidenced by two promissory notes, and which indebtedness the defendants claim then exceeded $15,000;

that *Mrs. Miller* had at times been addicted to the use of morphine, and in consequence had at times been insane and confined in different sanitariums; that some two years prior to the formation of such corporation she consulted the defendant *Hamilton*, as an attorney at law, in regard to her financial affairs with her husband, and at that time executed to him a general power of attorney in fact, to act for her in that regard in any manner he might see fit; that acting under the authority given by that power of attorney, and for the purpose of securing the payment of such indebtedness of *Samuel R. Miller* to his wife *Katie B.*, he procured the formation of the corporation and the transfer of the property to the same, and the issuing of the stock, as mentioned, and then, three days afterwards (being September 7, 1897), he induced *Samuel R. Miller* to assign and transfer to him the 148 shares of stock, consisting of eight several certificates, as trustee or attorney in fact, and as collateral security for the payment of such indebtedness to *Katie B. Miller*.

Such assignment and transfer of the stock to *Hamilton* were made, as found by the court, "with the understanding and agreement that in case any surplus remain in the hands of said trustee after paying her claims against her husband, *Samuel R. Miller*, such surplus should be immediately returned unto the said *Sam R. Miller* by the said trustee." This simply means that such assignment and transfer was made as collateral security by way of pledge, the surplus, if any, remaining the property of the pledgor. There is no claim that under ch. 414, Laws of 1891 (sec. 1751, Stats. 1898), such pledge could not be legally made without having been entered in the books of the corporation. *H. W. Wright L. Co. v. Hixon*, 105 Wis. 153. The very purpose of that amendment was to authorize such transfer, when made in good faith and for value, without such entry, and to make the same binding upon all parties.

But the validity of the transaction is challenged by the plaintiff upon other grounds. The plaintiff contends, and the court found as matters of law, in effect, that the transaction amounted to a voluntary assignment with unlawful preferences, and hence was contrary to the statute and void, under the repeated decisions of this court, citing secs. 1693*a*, 1694, Stats. 1898; *Winner v. Hoyt*, 66 Wis. 227, and several other cases following that case. This court has frequently held that a chattel mortgage given by an insolvent debtor to secure the payment of a debt to one of his creditors is not an "assignment for the benefit of creditors," within the meaning of the statutes or decisions cited. *Menzesheimer v. Kennedy*, 75 Wis. 411; *Stevens v. Breen*, 75 Wis. 595; *Cribb v. Hibbard, S., B. & Co.* 77 Wis. 199; *Michelstetter v. Weiner*, 82 Wis. 298. True, the giving and filing of a chattel mortgage are expressly authorized by statute; and the possession by the mortgagee of the property covered by the mortgage, without filing, is held to be equivalent to filing. Sec. 2314, Stats. 1898; *First Nat. Bank v. Damm*, 63 Wis. 249; *Carey v. Liverpool & L. & G. Ins. Co.* 92 Wis. 538, 540. Such mortgage, being given for security, leaves the mortgagor's interest in the property covered by the mortgage subject to the debts of the mortgagor. *Slaughter v. Bernards*, 97 Wis. 184; *Fred Miller B. Co. v. Manasse*, 99 Wis. 102. The same is true of the pledgor's interest in the property pledged. Thus, the statute expressly declares that "when goods and chattels shall be pledged or mortgaged for the payment of money or the performance of any contract or agreement the right and interest in such goods of the person making such pledge or mortgage may be sold on execution against him, and the purchaser shall acquire all his right and interest, and shall be entitled to the possession of such goods and chattels on complying with the terms and conditions of the pledge or mortgage." Sec. 2988, Stats. 1898. Since the statute (sec. 1751) expressly authorized *Samuel R. Miller* to pledge the

stock as he did, and since his "right and interest in such" stock was liable to "be sold on execution against him," it is very manifest that *Katie B.'s* interest in the stock so pledged was measured by the amount of her debt against her husband which the stock was pledged to secure, and not by the value of the stock itself. *McConon v. Russell*, 84 Wis. 122, 127. It follows from what has been said that if such indebtedness did not exceed the amount mentioned in the findings of the court, and the stock so pledged was of par value, then *Samuel R. Miller* did not part with all his property, but continued to retain a large amount subject to execution against him. True, it is said that *Hamilton* received the stock so pledged as trustee. But no one claims that he received it as trustee for any creditor other than *Mrs. Miller*. In receiving such stock as such pledge he acted for and in behalf of *Mrs. Miller*. Undoubtedly she could do through him, as her attorney in fact, in that regard, whatever she could herself do. It is very clear that the transaction did not constitute an assignment for the benefit of creditors, within the meaning of the statutes and decisions of this court cited. It is to be remembered, as indicated in the statutes and several of the cases cited, that an insolvent debtor is at perfect liberty to prefer one creditor to another, if he refrains from making an assignment for the benefit of his creditors. Since *Samuel R. Miller* did so refrain, he was at liberty to secure his indebtedness to his wife in preference to other creditors, provided he did so in a lawful manner.

Counsel for the plaintiff contend, and the court found, that such stock was so pledged and so accepted "for the purpose and with the intention of hindering, delaying, and defrauding the other creditors" of *Samuel R. Miller*. After careful examination of the record, we are convinced that the trial court reached such conclusion on the theory that, whenever an insolvent debtor makes payment to or secures one creditor in preference to others, he thereby deprives such

others, or some of them, from receiving anything or as much as they otherwise would have received, and therefore it necessarily results in hindering, delaying, or defrauding such other creditors, and hence they must be regarded as having so intended. But this court has repeatedly held, in effect, that an insolvent debtor is at perfect liberty to pay in good faith some of his creditors in full or in part, and others not at all, and that this can be done without any intent to hinder, delay, or defraud creditors, within the meaning of the statutes. Secs. 2320, 2323. True, the payment in good faith by an insolvent debtor of one or more of his creditors in full may result in defeating others, but such result is the mere incident to the preferring of one creditor to another, and hence does not come under the condemnation of the statutes. The object to be attained in such a case is to pay in good faith an honest debt, even though it leaves the debtor in no condition to pay any other debts. It is only when the object sought to be attained is itself vicious that the statutes condemn the transaction. *Erdall v. Atwood*, 79 Wis. 7, 8, and cases there cited. To the same effect, *Bannister v. Phelps*, 81 Wis. 256; *Barr v. Church*, 82 Wis. 382, 389; *Bleiler v. Moore*, 94 Wis. 385; *Koch v. Peters*, 97 Wis. 492; *Carey v. Dyer*, 97 Wis. 554; *H. B. Claflin Co. v. Grashorn*, 99 Wis. 356; *Cunningham v. Eagan*, 102 Wis. 272.

The evidence merely goes to the extent of proving that at the time of making the pledge *Samuel R. Miller* was being pressed by his creditors and was insolvent, but expected and intended to pay all his debts in time. *Hamilton* testified to the effect that when he received the stock he did not know that *Mr. Miller* was then insolvent, nor that the stock so pledged was practically all of his nonexempt property, and that he was then informed by *Mr. Miller* that he could pay everybody in full, unless he was crowded to a forced sale. Some of the cases cited go to the extent of holding that, to render a chattel mortgage or pledge given to secure

a *bona fide* debt fraudulent, it is not enough to show that the creditor knew or believed that the debtor was insolvent and intended to hinder, delay, or defraud creditors, but that it must be shown in addition that the creditor participated in such intent. *Erdall v. Atwood, supra; Bleiler v. Moore, supra; Koch v. Peters, supra; H. B. Claflin Co. v. Grashorn, supra.* *Hamilton* testified that whatever he did was to protect *Mrs. Miller*, as far as possible, and for that purpose he insisted upon *Mr. Miller* pledging the stock, as he did. We fail to find evidence sufficient to support the findings that *Mr. Miller* intended anything further by the transaction than to secure his indebtedness to his wife,— much less, that *Hamilton*, by taking such security, participated in any intent to hinder, delay, or defraud *Mr. Miller's* other creditors.

As indicated, the trial court found that in violation of an injunction the corporation on August 5, 1898, gave a chattel mortgage to a Kentucky party upon the property, upon which there was still due and unpaid $1,900, and thereby depreciated the value of the property to that extent, and that *Mrs. Miller* was liable in damages to that amount for such depreciation. Upon what theory the trial court reached such conclusion, we are unable to perceive. Counsel seem to argue that, because *Hamilton* held the stock for her, she was liable for the acts of the officers of the corporation in giving the mortgage. We are unable to perceive any force to such argument. There is no claim that *Mrs. Miller* or her attorney in fact violated any injunction, and we perceive no good reason for holding her liable for the conduct of others.

By the Court.— The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with direction to dismiss the complaint.

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HULIEN, Administratrix, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

April 30 — May 15, 1900.

Railroads: Injury causing death of engineer: Repairing engine: Failure to give warning: Collision: Contributory negligence.

While a train was standing on a sidetrack within a few car lengths of another train headed in the opposite direction, the engine of which was engaged in switching, the engineer, without setting the brakes or giving any signal or warning of any kind either to his own crew or to the crew of the other train, crawled under his engine for the purpose of making repairs and remained there a considerable length of time, until the rear end of his train was struck by the other train and his engine impelled forward several feet, fatally injuring him. Before going under the engine the engineer knew that his fireman was at work in such a position that it would be practically impossible for him to see any movement of the other train or signal to its crew. *Held*, that the deceased was guilty of contributory negligence precluding a recovery by his personal representative.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

The plaintiff sues as administratrix to recover for the death of Charles Hulien, her husband, which occurred August 3, 1894, at a station called Wittenberg, in Shawano county. The deceased was a locomotive engineer, and was employed as such by the defendant at the time of his death, and had been so employed for eight or nine years previously. Upon the day of his death he was operating an engine attached to freight train No. 43 upon the defendant's road. This train was going north, and had arrived at Wittenberg at about 9 o'clock a. m., and pulled in upon the passing track at said station, which was located east of the main track. There was another side track at said station, west of the main track, which was used for loading and unloading freight cars. Shortly after train No. 43 pulled in upon the

passing track, freight train No. 50 arrived at the station from the north, and passed down on the main track, and backed in from the south upon the passing track, and stopped with its caboose two or three car lengths south of the rear end of freight train No. 43. These two freight trains were waiting upon the passing track for the regular passenger train going south to pass upon the main track. While thus waiting, the engine attached to train No. 50 was detached from the train, with several cars, and commenced to do switching upon the west side track. While so engaged, the passenger train came in and went south. Soon after the arrival of train No. 50, the deceased left the cab of his engine, taking his fireman with him, and got down upon the east side of his engine, and went under the engine for the purpose of tightening the wedge which holds the driving box in position; his fireman at the same time being engaged in tightening a jam nut upon the east side of the engine. Upon leaving the cab, the deceased did not set the brakes upon his engine or upon the train, although six or seven of the forward cars had air brakes connected with the engine; nor did the deceased or his fireman notify any of the train crew that the engineer was going under the engine, nor did they notify any of the crew of train No. 50 of that fact, nor was any signal placed at the rear end of train No. 43. After the deceased had been under his engine some five minutes (the passenger train having in the meantime passed south), the engine of train No. 50 backed in again upon the passing track with some cars, and backed against the other part of train No. 50, which had been left upon the passing track, and backed up so far that the caboose was forced against the caboose of train No. 43, impelling it forward some ten or twelve feet, and fatally injuring the deceased, who was still under his engine, from which injuries the deceased died in a few hours.

A number of rules of the defendant company were put in

evidence, among which was rule 74, which reads as follows: "(74) A red flag by day and a red light by night, placed on the end of a car on side track, denotes that car inspectors are at work under the car or train. The car or train thus protected must not be coupled to or moved until the red signal is removed by the car inspectors. When a car or train standing on a siding is protected by red signals, other cars must not be placed in front of it, so that the red signal will be obscured, without first notifying the car inspector, that he may protect himself. This rule applies to trainmen, switchmen, or other employees who are under cars or engines, inspecting, repairing, or chaining up."

These facts appearing by the plaintiff's testimony, a motion for nonsuit was granted, and from judgment thereon plaintiff appeals.

For the appellant there was a brief by *J. W. Wegner* and *Timlin, Glicksman & Conway*, and oral argument by *Mr. Wegner*.

For the respondent there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *John T. Fish*.

WINSLOW, J. We shall consider but one question in this case, and that is the question as to whether the plaintiff's intestate was guilty of contributory negligence. Upon this question the material facts are that while his train was standing on the passing track, with another train standing within two or three car lengths, whose engine was engaged in switching, the deceased left the cab of his engine with his fireman, and crawled under his engine for the purpose of tightening the wedge which holds the driving box in position, the fireman being engaged at the same time in tightening a jam nut. Before going under the engine he did not set the brakes of his engine or train, although six or seven cars on the forward end of the train had air brakes

connected with the engine. He notified none of the train crew of his own train, save the fireman who was assisting him; he gave no warning to the crew of the other train. He placed no flag or warning at the end of his train, and he placed himself in a spot where he could see nothing of the movements of the train in his rear. He placed his fireman upon the east side of the engine, where it was practically impossible for him to see any movement of the other train, or signal to its crew. While in this situation his train was moved forward by the impact of the train in the rear, and he was killed. It may be assumed, for the purposes of the case, that the employees on the other train were negligent in allowing their train to strike and move the intestate's train, and it may also be assumed that the intestate, while tightening the wedge, was engaged in "operating" his engine, within the meaning of ch. 220, Laws of 1893 (sec. 1816, Stats. 1898), although these points are not decided, and no opinion is intimated upon either of them; and still, if it conclusively appears that the deceased was guilty of contributory negligence, the plaintiff cannot recover. Upon the facts stated, we are convinced that it must be said as matter of law, that the deceased was negligent in going under his engine as he did, irrespective of any rule. Rule 74, which is set forth in the statement of facts, simply emphasizes the negligence and makes it more glaring. The mere statement of the facts seems the most convincing argument. Common sense must say that an engineer who thus goes under his engine, and remains there a considerable time, leaving the brakes unset, with no signal or warning of any kind, while another engine is operating on the same track in close proximity, takes his life in his hand. To say that such conduct is ordinary care, or that it may become such by proof that others have done it and escaped with their lives, is to part company with reason. The nonsuit was right.

By the Court.—Judgment affirmed.

DESMOND vs. MCNAMARA and another, Respondents, and MCNAMARA, Appellant.

April 30—May 15, 1900.

Deeds: Covenants against incumbrances: Parol evidence: Acceptance: Assumption of debt: Execution of renewal mortgage by grantee.

1. Where a deed expressly provides that the grantees assume and agree to pay off a mortgage on the property conveyed, or expressly excepts a mortgage thereon from the covenant against incumbrances, parol evidence is inadmissible, in the absence of fraud or mistake, to show that at the time of the conveyance the grantor agreed to take care of such incumbrances.
2. The acceptance of the deed in such case was, in effect, an express promise on the part of the grantees, in respect to such incumbrances, to all intents and purposes the same as if signed by them.
3. Where property is purchased subject to a mortgage, the execution of a new mortgage by the purchaser when the old one matures is merely a recognition and affirmation of his previous agreement.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Action to foreclose a mortgage. The respondents, *Elizabeth McNamara* and *Mary Ann McNamara*, and the appellant, *Francis S. McNamara*, all joined as defendants, were each personally liable for the mortgage indebtedness. The only contest was between appellant and respondents. Issue was joined between them by the answer of respondents duly served upon appellant, and his answer thereto. That issue was in respect to whether appellant was bound to protect the respondents against liability for the mortgage indebtedness. The court found, as facts, on such issue, that for a considerable period of time prior to January 24, 1894, the respondents were in the employ of their father under a contract for hire; that on said day the appellant, for a good and valuable consideration, sold and conveyed the mortgaged premises to the respondents, which premises were

then incumbered by a mortgage in place of which the mortgage in suit was subsequently given; that appellant agreed to pay the mortgage indebtedness and to cause the land to be relieved of the incumbrance thereon at the maturity of such debt; that when the note evidencing such debt matured, appellant induced the respondents to remortgage the property to secure their note of $2,500 to pay it, he guaranteeing in writing the payment thereof, and verbally promising the respondents to take care of the same; that after the conveyance of the property to respondents as aforesaid, the father paid the interest on the mortgage and also paid the taxes on the property up to 1897; that this action is to enforce such mortgage. On such facts judgment was rendered against appellant and in favor of respondents for the total amount of the mortgage indebtedness and for costs recovered by plaintiff against the defendants, and for the costs of litigating the issue between respondents and appellant.

J. E. Wildish, for the appellant.

For the respondents there was a brief by *Blatchley & Burke*, and oral argument by *A. H. Blatchley*.

MARSHALL, J. It is contended that the finding, that there was a valuable consideration to support the conveyance of the property by appellant to respondents, is not supported by the evidence; that, on the contrary, the evidence shows clearly that the only consideration for such conveyance was the relationship existing between the parties; that otherwise it was a mere gift. We do not deem it necessary to decide that controversy, but will say, from a careful examination of the record, we have not been able to discover, very clearly at least, that it supports the finding of the trial court.

If the finding, that appellant agreed to pay off the incumbrance at the time the conveyance of the land was made, is not supported by competent evidence, waiving the

question of whether there was any consideration to support such a promise, then, manifestly, the judgment is wrong and must be reversed.

There were two deeds. The evidence satisfactorily shows that they were delivered at the same time and that one was intended as much as the other to be the means of vesting the title to the property in the respondents. The purpose of making two deeds appears to have been to enable each of the grantees to have evidence of her interest in the property. In one of the deeds the grantees expressly assumed and agreed to pay off the incumbrance on the property; in the other, the covenant against incumbrances expressly excepted the mortgage thereon, indicating, as clearly as such an exception can, that the grantees were bound to pay off the incumbrance, to the extent of the property, at all events.

The finding, that appellant agreed to pay the mortgage indebtedness secured by the mortgage in suit, was based wholly on testimony of the respondents that the appellant, when the deed was made, promised to do so, and repeated such promise when the new mortgage was made. No fraud is claimed, as we understand it, or, if claimed, none was found and none established by the evidence that would vary the relations between the parties as evidenced by the writings to which we have referred. When the respondents signed the note and mortgage in suit, the evidence shows, they fully understood that they thereby assumed the mortgage indebtedness, as between them and the mortgagee. But they say they relied upon the promise of their father, made when the deeds were delivered to them, to take care of such indebtedness, and the repetition of such promise when the mortgage in suit was made. So the case, on this branch, on the evidence, comes down to this: Can the transfer of the property, indicating by its terms that the grantor, as between himself and the grantees, was absolved from all responsibility by the mortgage indebtedness, be varied by

parol? On that point it is immaterial whether one of the deeds accomplished the transfer of the property, so that the other did not affect the transaction, or which one of the deeds effected the result, because both indicate that, as between the parties thereto, the property, at least, was dedicated to the payment of the mortgage indebtedness mentioned therein, and that the consideration for the conveyance was in part the payment of such indebtedness.

The only difference between the conveyance subject to the incumbrance and the one with the added clause whereby the grantees assumed and agreed to pay off such incumbrance, is that by the former the purchasers agreed that the property should be liable for the indebtedness and that they would, to that extent, protect the vendor from personal liability therefor, while by the latter they agreed to the same, and further, to be personally liable for the indebtedness to the mortgagee. Jones, Mortgages, §§ 736, 751. In either case the acceptance of the deed was, in effect, an express promise in writing, on the part of the purchaser, in respect to the payment of the mortgage indebtedness out of the property, to all intents and purposes the same as if it were signed by them. That is the effect of the decisions in this and other courts. *Enos v. Sanger*, 96 Wis. 150; Jones, Mortgages, § 751.

So the question presented here does not come within the rule that where, in part performance of an entire contract, a written agreement is made as to one portion of it, the balance can be established by parol; nor the rule that a different consideration than that mentioned in the deed may be shown by parol, so far as not inconsistent with the writing. The attempt here is to vary by parol the express written covenant in the grantor's deed that the title to the property described in it was conveyed subject to the mortgage of $2,500 to be paid by the property or on account of it, and vary the written agreement of the grantees that, to

the extent of the property, at least, they would be responsible to the grantor for such payment. No authority has been cited to our attention to warrant such a disturbance of a written agreement, and it is safe to say that none exists, except in cases of fraud or mistake, where the purpose was to avoid the writing on that ground or to secure its reformation.

While it is true that deeds are, in some respects, an exception to the general rule that writings between parties evidencing their agreements cannot be varied by parol, that exception has never been extended so as to authorize the contradiction or variation of any part of the agreement expressed in its entirety in the deed. It has been generally confined to variations or explanations of that part of the deed which, as to the grantor, is a mere receipt for purchase money, or of some portion of the instrument covering a distinct part of the oral agreement in execution of which the deed was made, and not inconsistent therewith.

It is uniformly stated in the books that oral testimony is inadmissible to establish facts, even in relation to the consideration in a deed, which are directly inconsistent with the writing. Jones, Ev. § 499; *Flynn v. Bourneuf*, 143 Mass. 277; *Kickland v. Menasha W. W. Co.* 68 Wis. 34; *Becker v. Knudson*, 86 Wis. 14; *Beckman v. Beckman*, 86 Wis. 655; *Salter v. Bank of Eau Claire*, 97 Wis. 87; *Morgan v. South Milwaukee L. V. Co.* 97 Wis. 275; *Stites v. Thompson*, 98 Wis. 330; *Perkins v. McAuliffe*, 105 Wis. 582.

This and other courts have held that the agreement distinctly stated in a deed cannot be contradicted or varied any more than in any other written instrument. *Powers v. Spaulding*, 96 Wis. 487, 489; *Unger v. Smith*, 44 Mich. 22; *Flynn v. Bourneuf*, *supra*.

Each of the cited cases, in principle, involved the precise question before us. In *Powers v. Spaulding* there was a covenant against all incumbrances except certain improve-

ment taxes, which the grantee assumed and agreed to pay in place of the grantor. Evidence to show a parol agreement pursuant to which the deed was made, limiting the amount of the incumbrances for special assessments which the purchaser was to pay, was held inadmissible.

In *Flynn v. Bourneuf*, the deed contained a general covenant against incumbrances. Evidence to show that there was an oral agreement pursuant to which the deed was made, that the purchaser would pay a particular improvement tax lien on the property, was held inadmissible.

In *Unger v. Smith* the deed was made subject to a mortgage which the purchaser assumed and agreed to pay. Evidence to show that there was an oral agreement that the seller would furnish the money to the purchaser with which to pay off the incumbrance was held inadmissible. Such evidence, said the court, would be clearly inconsistent with the agreement contained in the deed.

The conclusion reached is that the agreement as to the $2,500 mortgage, evidenced by the deed, to the effect that at least no obligation should rest on the grantor to pay it for the benefit of his grantees, must stand as the entire contract between the parties on that subject. It is not open to variation or contradiction by parol evidence. When the second mortgage was given, which the respondents signed, they merely recognized and affirmed what they had previously agreed in writing to do.

By the Court.— The judgment against the appellant and in favor of respondents is reversed,and the cause remanded with directions to render judgment in favor of *Francis S. McNamara* against his codefendants for his costs and disbursements incurred in the trial of the issue raised by the answer of such codefendants and the appellant's answer thereto.

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McAuliffe, Assignee, Respondent, vs. Jorgenson and others, Appellants, and Egelhoff, Respondent.

April 30 — May 15, 1900.

Mechanics' liens: Wells: Use of machine: Partnership: Evidence: Judgment.

1. The owner of a well-boring machine used in the construction of a well, who had hired it to the contractor, is not entitled to a subcontractor's lien for its use under sec. 3315, Stats. 1898, giving subcontractors a lien on the land on which a well is constructed for *work or labor* performed or *materials* furnished in digging it.
2. Where every reasonable probability, except E.'s denial, tended to show that J. and E. were partners in digging a well, such denial is *held* to have been so weakened by his admissions and want of frankness and by the evasive and equivocal character of his testimony on cross-examination, as not to support a judgment giving him a subcontractor's lien.
3. The lien for the construction of a well being limited to one acre where the land is situated in a city, it is error in such a case to single out and adjudge a lien upon any given portion of a tract containing several acres, in the absence of evidence locating the well upon any specific acre.

Appeals from a judgment of the circuit court for Milwaukee county: D. H. Johnson, Circuit Judge. *Reversed.*

The defendant *Grant Marble Company* is the equitable owner of the land described in the complaint, the title thereof being held in the name of the defendant *William J. Grant* for convenience. In March, 1898, the *Grant Marble Company* employed the defendant *Jorgenson* to drill a well upon its property. The latter, through the defendant *Egelhoff*, secured of the plaintiff the right to use a steam well-boring machine held by plaintiff as assignee, and used it in boring the well thirty-two days. The plaintiff brings this action to enforce a mechanic's lien upon the *Marble Company's* property for the use of said machine. The land described in the complaint consists of three and three-fourths

acres, situate in the city of Milwaukee. *Egelhoff* was made defendant, as having filed a lien for materials furnished and labor performed for *Jorgenson* in the construction of the well in question. The complaint and the answer of the defendant *Egelhoff* set out the rights claimed by them by appropriate allegations. The other defendants put such claims in issue, and the answer of *Jorgenson* alleges a partnership between himself and the defendant *Egelhoff* in digging and boring the well, and admits payment in full to him for the work so done. The court found that plaintiff was entitled to $64 from *Jorgenson* for the use of the machine, and gave him a lien upon the lands described in the complaint. It also found that *Jorgenson* was indebted to *Egelhoff* in the sum of $134.35 for material furnished and delivered and labor performed in the drilling of the well; that of this amount certain items, amounting to $34.02, were not such as to entitle him to a lien. Judgment was entered giving him a lien on the premises as a subcontractor for the amount found lienable and for a personal claim against *Jorgenson* for the remainder. It also gives plaintiff a lien for the amount of his claim. The liens claimed are given upon the east one acre of the land described in the complaint according to a certain plat attached to the judgment. *Jorgenson*, *Grant*, and the *Marble Company* have appealed, the first from the entire judgment, and the others from those portions affecting their interests.

For the appellants there was a brief by *Winkler*, *Flanders*, *Smith*, *Bottum & Vilas*, and oral argument by *F. H. Remington*. To the point that plaintiff's claim being simply for the rent or use of the machine, he is entitled to no lien, they cited *Lohman v. Peterson*, 87 Wis. 227; *Standard O. Co. v. Lane*, 75 Wis. 636; *Oppenheimer v. Morrell*, 118 Pa. St. 189; *Harrison v. Homœopathic Asso.* 134 Pa. St. 558, 566; *Basshor v. B. & O. R. Co.* 65 Md. 99, 103; Phillips, Mechanics' Liens, §§ 158, 159, 162; *Lambard v. Pike*, 33 Me. 141; *Baum v. Covert*, 62 Miss. 113.

For the respondents there was a brief by *John J. McAuliffe* and *Adolph G. Schwefel*, and oral argument by *Mr. McAuliffe.*

BARDEEN, J. 1. Plaintiff has no lien unless it is given him by virtue of secs. 3314, 3315, Stats. 1898. The former section provides, in substance, that every person who, as principal contractor, performs any work or labor or furnishes any material in digging or constructing any well shall have a lien upon the interest of the owner in the land upon which the same is situated, not exceeding one acre if within the limits of a city. Sec. 3315 provides substantially that every person who, as subcontractor of the principal contractor, performs any work or labor for or furnishes any materials to the parties named in the preceding section, shall have the lien and remedy provided by that chapter upon performing certain conditions, which it is admitted were performed in this case. Plaintiff's right to a lien is based upon the fact that he hired his well-boring machine to *Jorgenson*, who had the contract to bore the well. Laws giving liens to mechanics are equitable in their character, and are to be liberally construed to advance their objects; yet they are purely statutory, and cannot be extended by construction to cases not fairly and reasonably within their purview. It will be observed that the statute speaks of "work and labor" performed or "materials" furnished. Under no permissible theory can it be said the plaintiff has furnished any "materials" that entered into or became a component part of the well. Whatever right he has, if any, arises from the use of his machine. When he hired it to *Jorgenson*, to all intents and purposes it became the latter's machine, the same as if he had purchased it outright. The plaintiff did no manual labor, either by himself or his servants, toward the construction of the well. The machine was used by *Jorgenson* as though it was his own. For its use in connection with his own labors he would have been

entitled to a lien; not for the use of the machine alone, but because with his labors in the use and operation of the machine the well was drilled. The case is not unlike *Lohman v. Peterson*, 87 Wis. 227, where this court denied the right of an owner of oxen hired out to the person who performed labor in hauling ties to a lien upon the ties. The machine thus used is "the plant of the contractor," and can in no sense be said to be materials furnished or used in the drilling of the well. *Basshor v. B. & O. R. Co.* 65 Md. 99. To permit this lien to stand and be enforced would be stretching the lien law beyond any reasonable limit.

2. The second question involved in this case is whether *Jorgenson* and *Egelhoff* were partners in drilling this well. The court made no specific finding as to the fact, but the conclusion arrived at was adverse to the appellants' contentions. *Egelhoff* was given a lien for materials furnished by him to *Jorgenson* to the amount of $100.33, and a personal judgment for $34.02. This finding ought not to be disturbed unless we can say that it is clearly against the evidence. *Jorgenson* testified positively that such partnership existed. *Egelhoff* denied it, but at the same time admitted that he had no particular arrangement in regard to the deal, only that he was to get the machine and furnish the materials. He also admitted that the materials furnished were put in at cost price. After much evasion and shifting, he also admitted that he "may have had it on shares," and that he supposed he was to have a part of the profits. Independent of his denial, every reasonable probability in the case tends to show that he was interested as a partner in the contract. His conduct during the progress of the work is not reconcilable upon any other theory. Add to this his want of frankness, and the evasive and equivocal character of the testimony given by him on cross-examination, and we find it impossible to give much weight to his denial. Upon the whole evidence we think it is clearly and almost conclusively

shown that he was a partner in the transaction, and not entitled to enforce a lien against the appellants.

3. If it were admitted that the liens could be enforced, still the judgment in its present form could not be sustained. The complaint described the land in controversy as being within the limits of the city of Milwaukee, and to consist of three and three-fourths acres. The statute only allows a lien upon one acre when the land is within the limits of a city. No evidence was offered to locate the well upon any specific acre of land; hence the court had no authority to single out and adjudge a lien upon any given portion of the whole tract, without some evidence upon which such a determination could be based.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint and the answer of the defendant *Egelhoff*.

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NELSON and others, Appellants, vs. STEPHENS, Respondent.

March 1—June 21, 1900.

Option or land contract? Forfeiture: Failure to perform conditions precedent: Waiver: Tender: Sureties: Liability on undertaking.

1. J., having defaulted under a contract for the purchase from plaintiffs of certain lands, appealed from a judgment of foreclosure under that contract, S. signing the undertaking on appeal as surety. The judgment having been affirmed and an action brought on the undertaking, plaintiffs, J., and S. entered into a stipulation whereby in consideration of $325 then paid by J. and $12,000 to be paid by J.'s wife within thirty days, the said lands were to be conveyed to J.'s wife, the action dismissed, and the surety released. This stipulation was afterwards extended for sixty days by a writing providing, among other things, that the sum it was agreed J.'s wife should pay should draw interest. Neither writing was signed by J.'s wife or any one in her behalf. Except a small payment by J. no payment or tender was made within the time limit. *Held*, that both

writings constituted options to buy at a given price, and not contracts for the sale of lands; that, the conditions prescribed not having been complied with, the right to pay and demand a deed did not survive the time limited; and that S.'s liability on his undertaking was not altered or destroyed by the negotiations between plaintiffs and J.

2. The fact that plaintiffs, after the expiration of the option, agreed to accept a tender of the purchase money made by J., provided he also paid taxes levied on the land and the expenses incident to the option negotiations, cannot be considered as a recognition of the binding force of the original option after its expiration.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This action was commenced to recover upon an undertaking given by the defendant upon an appeal to this court from a judgment in favor of the plaintiffs and against one W. H. Jacobs. 99 Wis. 547. A jury was waived. This undertaking was conditioned that Jacobs should pay the costs on the appeal, not exceeding $250, all damages the plaintiffs might sustain by reason of the stay of proceedings, the value of the use of the premises pending the appeal, and any deficiency on the sale, not exceeding $2,000. The judgment was affirmed, the premises sold, and a judgment for deficiency entered for $4,195.58. At the sale the land was bid off by the plaintiff *Thomas Nelson*, in whose name it was held for convenience. This action was commenced in October, 1898. The defendant answered, claiming that he had been released because after the property had been advertised the sale had been adjourned without his consent. Later in the action defendant was permitted to amend his answer, and set up a defense from the litigation of which we glean the following:

While the action was pending, Jacobs began negotiations for a purchase of the land, and on December 13, 1898, the following stipulation, entitled in this action, was entered into:

"For the purpose of settling and discharging all matters

of difference growing out of the contract described in the complaint in the above-entitled action, together with all other causes of action arising and growing out of the judgment in said action, and the proceedings taken upon the bonds and undertakings given in said action, the following arrangement and stipulation is this day made and entered into by and between *George P. Nelson* and the other parties interested in said judgment, by Bashford, Aylward & Spensley, their attorneys, and William H. Jacobs in person, and *David Stephens*, one of the sureties upon one of said undertakings, by H. W. Chynoweth, his attorney, to wit: The said William H. Jacobs agrees to deposit in the First National Bank, Madison, Dane county, Wisconsin, the sum of $325; and the said *Thomas Nelson*, the owner of said land, is to deposit in said bank a warranty deed, with consideration of $21,000, to Mary E. Jacobs, for the real estate described in the judgment in said action, and conveyed by the sheriff of Dane county to said *Nelson*, in escrow, with instructions to said bank that if, within thirty days from this date, the said Mary E. Jacobs, or some one in her behalf, shall pay to said bank the sum of $12,000, then, and in that case, said deed and said sum of $325 shall be delivered to the said Mary E. Jacobs, or such person as she shall designate, and with the further instruction that in case said sum shall not be paid within said thirty days, that the said sum of $325 shall be forfeited, and that said sum and said deed shall be delivered by said bank to said *Thomas Nelson* or his assigns.

"It is further agreed that all proceedings upon said judgment, in the action against *David Stephens*, surety on the bond signed by him, shall be stayed until the expiration of said thirty days, and that if said sum of $12,000 is paid as aforesaid, that the judgment in the above-entitled action shall be discharged, and all actions against any surety upon any bond given in said action shall be dismissed, without costs to the defendant in said action; it being further agreed and understood that nothing contained in this stipulation

shall be taken and considered as in any way affecting the rights or liabilities of the said plaintiffs, or of said *David Stephens*, or of any or either of the sureties upon said bonds or undertakings, if said sum of $12,000 shall not be paid as hereinbefore provided.

"Dated December 13, 1898.

"BASHFORD, AYLWARD & SPENSLEY,
"Attorneys for Plaintiffs.
"H. W. CHYNOWETH,
"Attorney for *David Stephens*.
"W. H. JACOBS.

"We consent to the above:
"E. S. BARKER,
"S. M. JACOBS.

"The above stipulation shall apply to S. M. Jacobs and E. S. Barker, the same as if they were originally included therein.

"Dated December 14, 1898.

"BASHFORD, AYLWARD & SPENSLEY,
"Attorneys for Plaintiffs."

The money stipulated to be deposited in the First National Bank was paid over the same day, and receipted for by Mr. Van Slyke, president. The deed was deposited in escrow about the 20th of December. Mrs. Jacobs was unable to raise the amount stipulated within the time fixed, so on January 9, 1899, a supplementary stipulation was entered into at the request of Mr. Jacobs, as follows:

"In consideration of the sum of $675, this day deposited in the First National Bank of Madison, Wisconsin, it is hereby agreed that the time for the performance of the stipulation heretofore entered into on the 13th day of December, 1898, for the settlement of the matter in controversy between W. H. Jacobs and *Thomas Nelson et al.*, and the sureties on the bond of the said W. H. Jacobs in said action, namely, *David Stephens*, S. M. Jacobs, and E. S. Barker, shall

be, and the same hereby is, extended for sixty days; and in consideration of such extension it is agreed that Mary E. Jacobs or her assigns shall, at the expiration of said sixty days, pay the sum of $11,000, with interest thereon at the rate of six per cent. per annum, and on such payment shall be entitled to a conveyance of the lands mentioned in said prior stipulation in fee simple: provided, however, that, in case said sum is not paid upon the said date, that the $1,000 paid into said bank shall be forfeited. This agreement shall in no wise affect the rights or liabilities of any of the sureties on bond or undertaking in suit. Dated Madison, Wis., January 9th, 1899. The interest on $11,000 to be paid for sixty days to date of extension, to be paid in ten days.

"THOMAS NELSON,
"By N. B. VAN SLYKE, Agt.
"E. S. BARKER.
"DAVID STEPHENS,
"By H. W. CHYNOWETH, his Attorney."

On the same day Mr. Jacobs paid the sum of $675, and which was receipted for as follows:

"Received, January 9, '99, $675, on account of further extension sixty days, as agreed.

"N. B. VAN SLYKE,
"Agent for *Thomas Nelson*."

On January 13th, Jacobs paid Van Slyke $55 on account of interest. On February 7, 1899, Jacobs paid to R. M. Bashford, one of plaintiffs' attorneys, the further sum of $1,300, to apply on said agreement, with the understanding that such payment should not extend the time for the performance by Jacobs, and with the further verbal understanding that said sum should be forfeited if the balance of the money mentioned in said stipulation was not paid within the time stipulated. Jacobs was unable to secure the remainder of the money within the time limited. On March 17, 1899, *Thomas Nelson*, in whose name the title of the land stood, notified

Mr. Van Slyke, by letter of that date, that he did not want any more dealings with Jacobs, and that as things stood "we should proceed as if Jacobs was not." On March 25th, Jacobs called upon Mr. Van Slyke, and asked how much money was due on the deal, and thereupon the latter wrote on a small slip of paper the figures, which were a calculation of the amount up to March 13th, and added thereto the words, "and six per cent. interest since." He also notified him that he must bring the whole sum in a lump, and that partial payments would not be received. Jacobs made efforts to secure the money, but did not succeed until April 29th, when he deposited the sum of $9,830 in the First National Bank as and for a full discharge of the amount said to be due, which sum the plaintiffs refused to accept. The taxes on the land for 1898 amounted to $108, became a lien thereon on December 20, 1898, and were not paid by plaintiffs until April 10, 1899, and the court finds that they were not then paid for the purpose of complying with the agreement, but with the intention and expectation of exacting the sum from Jacobs in addition to the amount of the purchase price of the land, and that, if the deed had been delivered, it would not have conveyed an unincumbered title.

The court further finds that, at the time the tender was made and deed demanded, the plaintiffs refused the same on the ground that he should pay $383 additional for taxes and counsel fees in the case; that there was a mistake in the stipulation of January 9th, in that the words, "unless carried out," were omitted, and should be inserted at the foot, before the words, "Dated Madison, Wis., January 9, 1899."

As conclusions of law, the court held, in effect, that, by the failure of plaintiffs to pay the taxes, they failed to comply with the contract on their part, and that the deposit of the deed in escrow was not a conveyance in fee simple; that the plaintiffs waived the performance of the contract

on the part of W. H. and Mary Jacobs; that the contract of January 9, 1899, which was an extension and modification of the contract of December 13, 1898, was an open and subsisting contract on April 29, 1899, and W. H. Jacobs was not bound to pay either the taxes or attorney's fees; that the obligation of Jacobs was discharged by the tender of April 29, 1899; that such tender discharged the defendant from all liability upon the undertaking in suit; that the contract of January 9, 1899, should be corrected in the particular hereinbefore named, in order to carry out the clear intention of the parties; that defendant was entitled to a judgment dismissing the complaint. Due exceptions were taken, and a motion for a new trial denied. Judgment was accordingly so entered, and the plaintiffs have appealed.

For the appellants there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford* and *W. F. Vilas*.

H. W. Chynoweth, for the respondent.

The following opinion was filed March 20, 1900:

BARDEEN, J. The plaintiffs are entitled to judgment, unless the defendant has been discharged by their dealings with Jacobs. Under the facts shown, the defendant is entitled to no greater rights than the Jacobses would have had in a direct controversy between them and plaintiffs. At the outset, therefore, it is important to determine the exact legal status of the parties under the stipulations mentioned. It is virtually conceded that the stipulation of December 13, 1898, was nothing more than a mere option. Mrs. Jacobs was not bound by it, because she was not a party to it. W. H. Jacobs was not bound by it any further than to deposit the sum mentioned with the First National Bank, which was the consideration upon which the option was based. Without some consideration to support it, the option could have been re-

voked, at will, at any time before acceptance. *Connor v. Renneker*, 25 S. C. 514; *Sutherland v. Parkins*, 75 Ill. 338; *Borst v. Simpson*, 90 Ala. 373.

It is insisted, however, that the instrument of January 9, 1899, was such a modification of the prior one as to rise to the dignity of a land contract, and under it arises the rights of defendant as determined by the trial court. This is the important question in the case. Unless it can be said that these two instruments are something more than a mere option to sell at a given price, it is clear, under the authorities, that the right to pay and demand a deed did not survive the time limited. But before discussing that question we will consider the terms of the paper of January 9th, and its effect upon the prior one. Jacobs had had a prior contract for these lands from the plaintiffs, and had defaulted. It was in the action to foreclose that contract the undertaking in suit was given. The first stipulation indicates that the plaintiffs studiously avoided wording it so as to give Jacobs anything more than an option which would drop by its own weight at the expiration of the time limited. The first clause of the second instrument simply extends the option to purchase for sixty days, and is based upon the consideration of the deposit in the bank of $675 as earnest money. The second clause says: "And, in consideration of such extension, it is agreed that Mary E. Jacobs or her assigns shall, at the expiration of said sixty days, pay the sum of $11,000, with interest thereon at the rate of six per cent. per annum, and on such payment shall be entitled to a conveyance of the land mentioned in said prior stipulation in fee simple; provided, however, that in case said sum is not paid upon said date, that the $1,000 paid into said bank shall be forfeited."

There is not a word in this writing which changes the duty or increases the obligations of plaintiffs, except that the title to the land shall be conveyed in fee simple. The

signatures to this paper are significant. It is not signed by the plaintiffs' attorneys. It is simply signed by the plaintiff *Thomas Nelson*, by his agent, N. B. Van Slyke. It is not signed by Mrs. Jacobs, or by any one in her behalf. The copy kept by the plaintiffs was not even signed by Mr. Jacobs, but it appears that the one kept by defendant's attorney was so signed by him. No one enters into any engagement on behalf of Mrs. Jacobs. There is no claim that it was ever delivered to her, or to any one for her. Neither is there any showing or finding as to the possession of the premises. It does not appear that Mrs. Jacobs had any separate estate, or any interest in the property, except such as was sought to be created by the negotiations then in progress. Neither does it appear that W. H. Jacobs was her agent, or had any authority to bind her or her property, if she had any. Suppose the situation were reversed, and plaintiffs were seeking to enforce the contract on their part; we imagine they would find it very difficult to find anything in the findings or the record to support a claim that Mrs. Jacobs was bound by these writings, or that any one else was bound in her behalf. The signatures of Barker and defendant were put there for the evident purpose of avoiding any complications that might arise as to their obligations as sureties. As already noted, it was the purpose of the first stipulation to give Jacobs a mere option on the land, to be exercised within a given time. Evidently, plaintiffs did not desire to put themselves in a position to have to foreclose against him again. In view of the fact that it does not appear from the second paper that any one of the signers undertook to do anything for or on behalf of Mrs. Jacobs, or undertook or agreed themselves to pay any portion of the purchase price of the land, we are unable to discover any of the elements of a contract to convey land beyond that of a simple option, which terminated at the expiration of the time limited. The payments made were to be no part of the pur-

chase price, except upon the condition precedent that the remainder should be paid within the time specified. That the payment of the money at the time prescribed was a condition precedent is too clear for argument. A simple reading of the papers demonstrates the fact.

The law relative to this state of fact is so well stated in *Donnelly v. Eastes*, 94 Wis. 390, that we need not do more than refer to the case. One cannot secure relief from the failure to perform conditions precedent, even in equity, unless it is evident that the stipulation as to forfeiture is in the nature of *security*. *Gates v. Parmly*, 93 Wis. 294. No such considerations are here presented. No interest was secured in the land by the payments stipulated, and none was to pass except upon the conditions stated. Those conditions never having been fulfilled, neither the Jacobses nor the defendant are in a position to secure relief as a matter of right. In *Cummings v. Town of Lake R. Co.* 86 Wis. 382, it is said that rights under an option to buy land on or before a certain date expire on that date without notice or declaration of forfeiture. In *Richardson v. Hardwick*, 106 U. S. 252, we find it stated that where one has, by a contract, the privilege or option of buying an interest in lands by paying a certain sum within a limited time, the contract itself does not vest him with any interest or estate in the lands, and by his failure to pay the money, or any part of it, within the time limited, the privilege accorded him by the contract is at an end, and his rights under it cease. See the following cases to the same effect: *Bostwick v. Hess*, 80 Ill. 138; *Bashor v. Cady*, 2 Ind. 582; *Steele v. Bond*, 32 Minn. 14; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164; *McManus v. D., C. & N. R. Co.* 51 Minn. 30; *Lord Ranelagh v. Melton*, 10 Jur. (N. S.), 1141; *Brooke v. Garrod*, 3 Kay & J. 608.

In speaking of options to purchase, 1 Warvelle, Vendors, 187, says: "It is not a contract of sale, within any definition of the term, and, at best, but gives to the option holder

a right to purchase upon the terms and conditions, if any, specified in the agreement or proposal. The right, to be made available, must be exercised at or within the time specified in the agreement, and the conditions precedent, if any are annexed, must be faithfully and punctually performed. A partial performance of some of the stipulations which it is intended shall form a portion of the future contract of sale, while they may indicate an intention to make the purchase, does not confer any additional rights upon the prospective purchaser, where the conditions upon which the option and right of purchase depend have not been complied with, and the noncompliance with such conditions is a sufficient ground for a denial of any claim of right in the land under the agreement."

And writing of the right to recover money paid, the same authority (vol. 2, p. 831) says: "And when it is not a question of penalty or forfeiture, but only a privilege conferred upon payment of money at a stated period, the privilege is lost if the money is not paid, and the court will not restore it to the party."

Relying upon the authorities cited, we conclude that, construing both writings with the greatest liberality, they amounted to nothing more than an option to buy upon the terms stipulated, and, the conditions prescribed not having been complied with within the time limited, neither the Jacobses nor the defendant can obtain any relief therefrom. The payment of money ($1,300) on February 7, 1899, did not in any way change the rights of the parties. It was expressly stated that it was received subject to the terms and conditions of the agreement. That it may be retained by plaintiffs as a forfeiture is doubtful. There was no consideration for its payment, except in fulfillment of the original agreement, and to retain it as a further forfeiture under it would be taking money without any consideration passing to the payer or any disadvantage to the payee.

After the time limited by the agreements had expired,

and before Mr. Jacobs had held any communication with Mr. Van Slyke, *Nelson's* agent, *Nelson* notified the agent, in effect, not to have anything more to do with Jacobs, and that he considered the deal closed. This was virtually annulling his authority to further deal with Jacobs. Van Slyke was a special agent, and his authority must be strictly pursued, or his principal is not bound. *Dodge v. Hopkins*, 14 Wis. 630. His authority to deal with Jacobs having been revoked, the giving of the slip of paper to Jacobs containing a computation of the amount due on the land would not bind plaintiffs as a waiver, unless ratified by them. But, even if he possessed plenary authority in the matter, it is doubtful if a waiver could be predicated upon so trivial a circumstance. In the letter from *Nelson* to Van Slyke, referred to, the former had signified his willingness to negotiate to convey, if Jacobs could secure some one who would take up the deal in his own name and on his own responsibility; but it was expressly stipulated that, in case that was done, the purchaser must pay all losses and expenses incurred. Both Jacobs and defendant had been notified of the principal's instructions, and the giving of the memorandum mentioned is perfectly consistent with the attempt of Jacobs to secure a purchaser. The fact that, when the tender on behalf of Mrs. Jacobs was eventually made, the plaintiffs insisted upon the payment of taxes and expenses before the deed would be delivered, cannot be considered as a recognition of the binding force of the original option after its expiration. Jacobs was at all times the moving spirit. Either through misfortune or perversity, he had failed to comply with any of the stipulations in a timely manner. The plaintiffs had a right to stand upon the letter of their contract, and a willingness to convey upon payment of the additional costs and expenses cannot be said to be waiver or resurrection of the right that had been lapsed. The principles sought to be invoked by defendant's counsel as to relief from forfeitures apply to land contracts pure and simple, and can

have no application to a mere option to purchase. The error made in the court below was in treating the transaction on the former basis. As we view it, the payment of the money due for the land was a condition precedent to the vesting of any interest or title therein, and, not having been done within the time limited, the contract ended, and has never been revived. As stated in *Donnelly v. Eastes*, 94 Wis. 390: "This appears to be a harsh doctrine, when viewed apart from the reasons for it. Courts give effect to contracts according to the intention of the parties,— do not make them. They cannot substitute a new contract for the one the parties see fit to make, because nonperformance on the part of one of the parties thereto becomes difficult, or the consequences of such nonperformance onerous. If one agrees that full performance of all obligations on his part shall be requisite to the enjoyment by him of any benefit under the contract, he is presumed to know the legal effect of assuming such obligation, to have done it for a consideration, and must abide the consequences of it, and not expect, by the aid of a court of equity, to shift the burden onto others which he has voluntarily agreed to bear himself."

It follows, from the conclusions suggested, that the judgment entered cannot stand.

There being no dispute in regard to the facts upon which the plaintiffs' cause of action is based, the judgment of the circuit court will be reversed, and the cause remanded with directions to enter judgment for the plaintiffs for the amount demanded in the complaint.

By the Court.— So ordered.

A motion for rehearing was submitted for the respondent on the brief of *H. W. Chynoweth*, attorney, and *James G. Flanders*, of counsel, and for the appellants on that of *Bashford, Aylward & Spensley*, attorneys, and *W. F. Vilas*, of counsel.

The motion was denied June 21, 1900.

HOOD, Administrator, Appellant, vs. DORER, Respondent.

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March 21—June 21, 1900.

Wills: Construction: Equitable conversion: Charitable trusts: Indefiniteness in beneficiaries: Judgments: Res adjudicata.

1. A provision in a will, that real property be invested in a certain fund for the support and maintenance of a charity, is a direction to convert such property into money.
2. Testator, by his will, directed that upon the death of his wife his entire property be invested in a fund, provided for that purpose, for the benefit of the superannuated preachers of the church denominated the United Brethren in Christ. *Held*, that said clause is essentially a trust provision, applicable to a particular charitable purpose as distinguished from charity generally, with a class within which a trustee, when appointed, can select the beneficiaries, and is not too indefinite in its provisions to be enforced. *Harrington v. Pier*, 105 Wis. 485, followed. CASSODAY, C. J., dissents.
3. Testator's widow, to whom a life estate in the entire property was given, in an action for the construction of the will named as defendants "the superannuated preachers of the church denominated the United Brethren in Christ." Such persons were not a body corporate, and there was no proof of service of the summons on any person who was a superannuated preacher. *Held*, that the judgment rendered in that action, in effect that the real estate in question descended as intestate property to the widow, was not *res adjudicata* as to those persons.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

This is an action in ejectment for the recovery of 120 acres of land in Grant county, Wisconsin, both parties claiming title under one Thomas Stewart, now deceased, the plaintiff being the administrator *de bonis non* of the estate of said Thomas Stewart. The evidence upon the trial showed that Thomas Stewart owned the property in question during his lifetime, and that he died September 13, 1882, leaving a widow, but no descendants; that he left a will, which was afterwards probated, the material parts of

which will are as follows: "First. After the payment of my just debts and funeral expenses, I give, devise, and bequeath unto my beloved wife, Mary Ann Stewart, for and during her natural life, provided she remains single after my decease, the use of and sole control and right to all my real and personal estate in the state of Wisconsin or elsewhere of which I may die possessed or be entitled to, and on her decease the said property to be invested in a fund provided for that purpose for the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ. I give and bequeath to Solomon Stewart, my brother, the sum of one dollar; to my brother Abraham Stewart the sum of one dollar; and to my sister, Susan Keys, the sum of one dollar. I hereby nominate and appoint —— the executor of this, my last will and testament, and hereby authorize and empower him, the said ——, to compound, compromise, and settle any claim or demand which may be against or in favor of my estate."

Mary Ann Stewart, the widow, was duly appointed administrator with the will annexed of the estate of Thomas Stewart, and in August, 1883, she brought an action in the circuit court for Grant county for the construction of the will, naming as defendants in that action "the superannuated preachers of the church denominated the United Brethren in Christ" and De Witt C. Wood and William Loney. The summons and complaint in said action were served upon the defendants Wood and Loney, one of whom was a preacher in said denomination, and the other a class leader, but neither of them was a superannuated preacher. An answer was served in that action by John D. Wilson, who apparently appeared as the attorney for the defendants generally, which answer was verified by William Loney, and prayed a judgment of the court declaring the bequest for the benefit of the superannuated preachers a valid one. The

action was tried by the court, and resulted in findings and judgment that the devise in question was void, and that the real estate of Thomas Stewart descended to Mary Ann Stewart in fee.

After this judgment Mary Ann Stewart sold the real estate in issue in this action to the defendant, who took possession thereof, and was in possession at the time of the commencement of this action claiming title. Mary Ann Stewart afterwards married one Haskins, and died before the commencement of this action. After her death the plaintiff was appointed administrator *de bonis non* with the will annexed of the estate of Thomas Stewart, and he brings this action as such administrator, claiming that the provisions of the will are valid, and that he is entitled to the possession of said real estate in order to sell and convert the same into money, and create the fund directed by said will.

On the trial of this action it appeared that the United Brethren in Christ are a sect of Protestant Christians organized early in the present century in the state of Maryland, and that at the time of the execution of Thomas Stewart's will they numbered about 150,000 members in the United States and Canada, and that they had a church government and discipline, having colleges and educational institutions, ordained bishops and ministers, and holding conferences.

The court held the direction in the will for the benefit of the superannuated preachers void for uncertainty, and the administrator appeals.

For the appellant there were briefs by *Bushnell, Watkins & Moses*, and oral argument by *A. R. Bushnell.*

Aldro Jenks and *H. W. Brown*, for the respondent.

The following opinion was filed April 6, 1900:

WINSLOW, J. The sole question presented is as to the validity of that provision of the will of Stewart which directs that upon the decease of his wife his entire property is "to

be invested in a fund provided for that purpose for the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ."

There can be no doubt but that this clause amounts to a direction to convert the real estate of which he died possessed into money. In no other way can real property be *invested in a fund.* Hence the doctrine of equitable conversion applies, and, if a bequest of personal property to be used for the support of the superannuated preachers of a particular sect is valid, then this clause in the will is valid. In disposing of the case the trial judge held the will void on the ground of uncertainty and indefiniteness, relying upon the case of *Will of Fuller*, 75 Wis. 431. Were the rule of that case to be followed, it is not easy to see how the conclusion reached by the trial judge could be avoided. In the recent case of *Harrington v. Pier*, 105 Wis. 485, however, the doctrine of the *Fuller Case* was substantially overruled. In fact in that case nearly or quite all the questions which arise in this case were so fully treated by Justice MARSHALL, the result being to sustain such a trust as that before us, that it would seem unnecessary to enlarge upon the subject here.

In that case it was said: "It follows that indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, want of a trustee, if there be a trust in fact, or indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or indefiniteness of mode of carrying out the particular purpose, do not militate against the validity of a trust for charitable uses. Given a trust, with or without a trustee, a particular purpose, as education or relief of the poor as distinguished from a bequest to charity generally, and a class, great or small, and without regard to location necessarily, as 'worthy indigent females,' or 'indigent young men studying for the ministry,' or 'resident poor,' or 'indigent children of Rock county,' or 'the boys and girls of California' (*People ex rel. Ellert v. Cogswell*, 113 Cal. 129), and we have a good trust

for charitable uses. The court, through its strictly judicial power, may fill the office of trustee, if necessary. The trustee can select the immediate beneficiaries or objects within the designated class and scheme. He can determine upon the details necessary to effect the intention of the donor within the general limits of his declared purpose, and execute the trust accordingly; and the proper public agencies, if necessary, can invoke judicial power to enforce such execution."

These considerations really dispose of the present case. There are present in this bequest all the essential requirements above enumerated. The provision is essentially a trust provision. No trustee is appointed, but the proper court has power to appoint one, so that the trust may not fail (*Sawtelle v. Witham*, 94 Wis. 412), and there is a particular and meritorious charitable purpose, namely, the support and maintenance of the worn-out preachers of a certain religious body. This completes the charitable scheme so that it may be carried out. The trustee appointed by the court can select the beneficiaries within the class named, and can wisely settle the necessary details of administration of the charity within the general limits of the testator's declared intention without serious difficulty.

It was not seriously claimed upon the argument that the judgment in the former action brought by the widow for construction of the will, in which "the superannuated preachers" of the sect in question were named as defendants, was of any effect, nor is it seen how it could have any effect. The "superannuated preachers" were not a corporate body, and hence not capable of being sued under such a general designation. Furthermore, they are necessarily constantly changing, and, even if some of the then members of the class actually appeared and defended, the result, manifestly, could not bind others.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff.

CASSODAY, C. J. I dissented in *Harrington v. Pier*, 105 Wis. 485. The court holds that the decision of this case is ruled by the opinion of the court in that case. The two cases are fairly distinguishable in their facts. I may, therefore, be permitted to respectfully dissent in this case. In doing so, I shall add but very little to what is contained in my dissenting opinion in that case. I fully concur in the findings of Judge CLEMENTSON in the action to construe the will in this case, and which findings are in the record, and also with the findings and opinion of the late Judge BENNETT, in this case, to the effect that the provision of the will in question is too indefinite and uncertain to enable the court to ascertain and carry out the supposed intentions of the testator; "that the beneficiaries are not ascertained, or in law capable of being ascertained, and that the trust attempted to be created by said will is void." If the *cy pres* doctrine under 43 Eliz. ch. 4 (2 Stats. at Large, 708), mentioned in the dissenting opinion in the other case, was in force in this state, it might be an important question whether the bequest in this case "for the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ" came within any of the numerous objects therein mentioned. If any, it would seem to be the first, which is, "for *relief* of the aged, impotent, and poor people." "Superannuated preachers" are, manifestly, such preachers as are impaired or disabled through old age, for such is the definition of the word. Cent. Dict. If such "relief" was only intended for those who are "poor," then it would not come within the provisions of that statute, since, in the language of Sir WILLIAM GRANT, "the question is, not whether he [the trustee] *may not apply it* upon purposes strictly charitable, but whether *he is bound so to apply it.*" *Morice v. Bishop of Durham*, 9 Ves. 406. While it may be true that most preachers who are impaired or disabled through old age are poor, yet they are not necessarily

all poor. But, as I do not understand that the opinion of the court in *Harrington v. Pier*, *supra*, or in this case, is based upon the *cy pres* doctrine under the statute of Elizabeth, it is unnecessary to consider the question.

A motion for a rehearing was denied June 21, 1900.

SMITH, Respondent, vs. PUTNAM and others, Appellants.

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April 11 — June 21, 1900.

Logs and timber: Partnership agreement: Suit at law: Recovery of profits: Waiver: Parol contract for dealings in land: Statute of frauds: Executed agreement: Contribution to partnership: Joinder of causes of action: Interest: Appeal: Record.

1. The agreement of the parties was that plaintiff should investigate and locate desirable timber lands; that, on defendants' approval, defendant P. should advance the necessary money to purchase the lands, he to be repaid with interest; and that, on purchase, they would either sell or log them, the profits or losses to be shared equally between the parties. *Held*, that this constituted a partnership, since all shared in the conduct and risks of the business and the ultimate division was to be of the profits as such.
2. In an action at law for the recovery of a share of the profits of a partnership agreed to be paid, the answer suggested, but did not clearly allege, a partnership. The partnership was established by plaintiff's own testimony, and both parties proceeded, without objection, to introduce all evidence necessary to establish the state of accounts between them. Not until the hearing of the motion to confirm the referee's report did defendants clearly object to the adjudication of the amount due in the legal action. All the transactions were so completed as to make nothing necessary but the ascertainment of a money balance due from one partner to another. *Held*, that defendants' conduct was such as to waive any objection to the form of action which they might have made by reason of the fact that the claim grew out of a partnership.

3. A parol contract of partnership for dealing in lands is within the statute of frauds so long as it is still executory: but where, under a partnership agreement, plaintiff explored and found land and standing timber, and after defendants had bought it, the timber was logged, the land sold, and a division of the proceeds made, incomplete only because erroneous in amount, the contract was fully executed, and hence was not within the statute.
4. A finding that a transaction in issue was within a partnership agreement, and not a separate and independent transaction of the defendants in which plaintiff was not a participant, will not be disturbed on appeal, where the evidence of the parties is squarely in conflict, and there are items of circumstantial evidence confirmatory of either theory.
5. Plaintiff and defendants entered into an agreement to purchase and log lands, each to receive one fourth of the net profits, each enterprise to be separate and the profits divided and paid as soon as closed. Three enterprises were taken up and two completed, for which plaintiff received an incorrect sum, as representing his share in one, and a statement of the profits in the other was rendered. The third enterprise was uncompleted and unsettled when he sued at law to recover the sum due him on all three enterprises. *Held*, that the parties had, by agreement, so severed their different transactions that plaintiff's share of the profits in the first two could be properly ascertained without involving the incomplete third enterprise; and that, defendants having by their conduct on the trial waived their right to insist that the relief should be had in a suit in equity, a money judgment was properly rendered for the amount ascertained to be due plaintiff in the first two enterprises.
6. The joinder of an unpaid balance due plaintiff for labor and materials furnished the partnership of which he was a member, with the claims of plaintiff against the firm as a partner, if improper, is waived by failure to seasonably object on that ground.
7. Where the date when the debtor ought to have paid is fixed by agreement, it is error to allow interest from a date before that time.
8. Where plaintiff in one of the transactions of the partnership turned in certain logs of his own, it is error to allow him interest on the price thereof, in the absence of an agreement that he should receive interest on any contributions he should make.
9. Where the record and bill of exceptions do not show that a certain motion was made, other evidence of such fact, even if material, cannot be accepted on appeal.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

The complaint, unverified, alleged that the defendants were copartners under the name of H. C. Putnam & Co., and as such entered into an agreement with the plaintiff in the year 1888 to the effect that if he would investigate, examine, and bring to their attention desirable timber lands, which they approved, they would purchase and either sell or log the same (the plaintiff acting in conjunction with them), and would pay him for his labor in so doing one fourth of the net profits realized by them; also, that they would employ him, at proper prices, to do the logging, and that under such agreement the three parcels known as the "Log Creek lands," the "Thornapple lands," and the "Main Creek lands," were purchased, and profits realized. The details of the complaint need not be further stated.

The answer, also unverified, in terms denied the partnership of the three defendants, but in legal effect admitted it. It, however, denied that they entered into the arrangements alleged in the complaint, but alleged that they individually entered into an arrangement with the plaintiff in 1888 whereby he was to find timber and timber lands; *H. C. Putnam* should advance the necessary funds, and from the proceeds should be repaid such advances, with seven per cent. interest; that *Thompson* and *E. B. Putnam* should take charge of the purchase, logging, and sale of the logs; that plaintiff should cut and log the timber, and drive the logs, at prices specified, and that one fourth of the net profits that should be derived from said premises should belong to each of the parties; and that each of the parties should own an undivided one-fourth interest in the lands after the timber had been cut therefrom and sold. The answer admitted that the Log Creek lands and the Main Creek lands were purchased under this arrangement, and that the plaintiff had been paid in full all sums due him thereon; that the Thorn-

apple lands were not purchased in pursuance of said agreement, or any agreement with the plaintiff; and that he had no interest therein. The answer further set up that the arrangement was verbal, and therefore void, under sec. 2307, Stats. 1898.

The court made an order of compulsory reference, and on the trial before the referee the plaintiff testified to the arrangement, which was that such lands as he might find, and after investigation bring to the attention of the defendants, who did in fact constitute a partnership engaged in various kinds of business, should be considered, and, if approved, would be purchased, *H. C. Putnam* advancing any money necessary for the purchase or for the handling of the lands, *Mr. Thompson* keeping the accounts, and the plaintiff superintending any logging operations that might be deemed advisable; that from the proceeds *Mr. Putnam* should be repaid all the advances made by him, with seven per cent. interest; that the profits upon each deal or enterprise that might be undertaken by them should, immediately on its completion, be divided equally among the four parties; and that any losses should be shared in the same proportion. The trial then proceeded, and a large amount of detail evidence was taken as to the purchase, handling, and disposal of the three different enterprises, which were claimed to have been undertaken at different times under the general arrangement above stated, with no express suggestion from the defendants' attorney that he claimed the relationship between plaintiff and defendants to be a partnership, and that he made any objections to the plaintiff's claims, other than those set forth in the answer.

The referee found as a fact that no partnership existed, and reports in his conclusion of law that no question of partnership was litigated on the trial. He states the accounts of the three several enterprises or real-estate purchases, and also the accounts of services rendered by and payments made

to the plaintiff for cutting and driving logs, and finds an amount due from the defendants to the plaintiff of some $5,200.

These findings were in all respects confirmed by the court, whereupon, before judgment, defendants moved to amend their answer: first, by correcting a clerical error; and, secondly, by setting up distinctly, as an objection to recovery, the fact that a partnership existed between plaintiff and the defendants, and that the sums claimed were for profits of a yet unsettled partnership. The latter portion of the application was denied, and judgment rendered. Other facts, so far as material, will appear in the opinion.

Defendants appeal.

For the appellants there were briefs by *Frawley, Bundy & Wilcox*, and oral argument by *C. T. Bundy*. They contended, *inter alia*, that it is settled that standing timber is part of the land whereon it is standing, and a contract for its purchase is a contract for an interest in lands within the statute of frauds. *Strasson v. Montgomery*, 32 Wis. 52; *Warner v. Trow*, 36 Wis. 195; *Young v. Lego*, 36 Wis. 394; *Daniels v. Bailey*, 43 Wis. 566; *Lillie v. Dunbar*, 62 Wis. 198; *Seymour v. Cushway*, 100 Wis. 580. An oral agreement of partnership for the purpose of dealing in lands or standing timber is within the statute of frauds and void, and no action at law for a breach thereof can be maintained. *Bird v. Morrison*, 12 Wis. 138; *Clarke v. McAuliffe*, 81 Wis. 104; *McMillen v. Pratt*, 89 Wis. 612; *Seymour v. Cushway*, 100 Wis. 580. On accounting between partners interest cannot be allowed on advances, overdrafts, or undivided profits, unless by express agreement. *Dexter v. Arnold*, 3 Mason, 284; *Gaye v. Parmelee*, 87 Ill. 339; *Buckingham v. Ludlum*, 29 N. J. Eq. 345; *Sweeney v. Neely*, 53 Mich. 422; *Gilman v. Vaughan*, 44 Wis. 646; *Carroll v. Little*, 73 Wis. 52.

For the respondent there was a brief by *Wickham & Farr* and oral argument by *James Wickham*. They contended,

inter alia, that the defense of partnership, like any other defense, can be waived if not taken advantage of in the proper way. *Tolford v. Tolford*, 44 Wis. 547; *Candler v. Rossiter*, 10 Wend. 487; *Smith v. Allen*, 18 Johns. 245; *Douthit v. Douthit*, 133 Ind. 26; *Kunneke v. Mapel*, 60 Ohio St. 1; *Whetstone v. Shaw*, 70 Mo. 575; *McCormick v. Ketchum*, 48 Wis. 643; *Leonard v. Rogan*, 20 Wis. 540. The agreement between the parties was not void under the statute of frauds. *Watters v. McGuigan*, 72 Wis. 155; *Treat v. Hiles*, 68 Wis. 344; *Hill v. Palmer*, 56 Wis. 123; *Kickland v. Menasha W. W. Co.* 68 Wis. 34; *Babcock v. Reed*, 99 N. Y. 609.

The following opinion was filed May 15, 1900:

DODGE, J. We are all fully satisfied that the evidence, by a clear preponderance thereof, establishes the existence of a partnership between the plaintiff, *Smith*, on one side, and *H. C. Putnam*, *E. B. Putnam*, and *G. T. Thompson*, on the other, whereby they were to engage in the purchase either of timber lands or standing timber from time to time, as the plaintiff should find and bring to the notice of the others favorable opportunities; that *H. C. Putnam* was to furnish such money as was necessary for the purchase of land or timber, and for handling the same; that the plaintiff, *Smith*, was to superintend any logging that might be decided on, and that *Thompson* was to keep the accounts, and handle the finances, and make sales; that *Putnam* was to be first repaid moneys advanced by him, with seven per cent. interest to the time of their repayment; and that the profits or losses were to be shared equally between the four individuals, which division was to be made as soon as each of the transactions was finished up. That such was the arrangement, plaintiff testifies, and therein is confirmed by the defendants. That this constituted a partnership, as a necessary result of the terms agreed on, seems entirely clear under the authorities. They all shared in the conduct and

the risks of the business, and the ultimate division was to be of the profits as such. George, Partnership, § 17; *Miller v. Price*, 20 Wis. 117; *Upham v. Hewitt*, 42 Wis. 85; *Treat v. Hiles*, 68 Wis. 344; *Clinton B. & I. Works v. First Nat. Bank*, 103 Wis. 117.

Appellants' first principal contention is that an action to close up a partnership, settle accounts between the partners, and divide the property, can only be maintained in equity; that courts of law have not at their command the methods of procedure nor the adjustable forms of decree necessary to accomplish the result. While it is an undoubted general rule that courts of law have not the machinery at their command often necessary to properly settle and close up partnerships, and that such actions must be in equity, yet, where the reason fails because of the fact that all of the transactions are so completed as to make nothing necessary but the ascertainment of a money balance due from certain of the partners to another,— a function which a court of law can perform,— the objection to the entertainment of a suit by such a court is one which may be waived. The objection resulting from the inability of the court to do the things necessary to complete relief no longer exists, and, if the parties consent, the court may act though in a common-law action, and may ascertain what amount is due, and may render judgment therefor, as in any other case of a money demand. *Tolford v. Tolford*, 44 Wis. 547; *McCormick v. Ketchum*, 48 Wis. 643, 644; *Kunneke v. Mapel*, 60 Ohio St. 1; *Whetstone v. Shaw*, 70 Mo. 575, 580; *Trowbridge v. Wetherbee*, 11 Allen, 361, 365. By the answer in this case some facts tending to create a partnership are suggested, but defendants' contention that such relation was created was not at all clearly stated therein. It is ambiguous, and did not fairly notify the plaintiff that the defendants made any objection to his action at law by reason of the fact that the indebtedness claimed by him arose out of partnership transactions. The fact of the partnership

was, however, clearly disclosed early in the trial of the case by the plaintiff's own testimony; but both parties proceeded without objection to introduce all evidence necessary to establish the state of the accounts between them, and not until after the referee's report had been made and judgment was about to be entered, did defendants clearly object to the adjudication of the amount due in this legal action. It seems clear that defendants' conduct has been such as to waive any objection, which they might have made by reason of the fact that the claim grows out of a partnership, to the ascertainment of whether or not there exists a debt presently due from the defendants to the plaintiff, and the rendition of a judgment therefor, provided, at least, that nothing is necessary to accomplish that result which transcends the powers of a court of law, such as the ascertainment and adjustment of debts of the firm, or the appointment of a receiver to dispose of assets yet on hand.

The next objection made by appellants to any recovery is that the arrangement, whether constituting a partnership or not, involved a dealing in lands, and is therefore denied enforcement in court by the statute of frauds. That such dealings were involved, as an essential element of the contract, cannot be denied, whether the purchases to be made thereunder were of the title to lands, or only of the timber standing thereon. Nor does the fact that the contract was for partnership dealing meet the objection. This court, at an early day (*Bird v. Morrison*, 12 Wis. 138), adopted the position that a contract of partnership for dealing in lands was within the statute, and has adhered thereto ever since. *Clarke v. McAuliffe*, 81 Wis. 104; *McMillen v. Pratt*, 89 Wis. 612; *Seymour v. Cushway*, 100 Wis. 580. That view has now so fully become a rule of property in this state, that we must adhere to it, notwithstanding the weight and respectability of the authorities to the contrary elsewhere. See note to *Bates v. Babcock* (Cal.), 16 L. R. A. 745; Browne, Stat. Frauds,

§ 262. In applying the statute of frauds, courts long since recognized an exception, or more properly a distinction, in cases where a contract void by the statute had been fully executed, and one party sought to retain the fruits of the dealing in defiance of his promises. Such situation was declared to be not within the purpose of, and so not sheltered by, the statute. It has therefore been held in a vast array of decided cases that where the parties have fully executed all parts of such a contract relating to or affecting interests in land, so that the courts do not need to enforce anything with reference to the land itself, the rights and duties of the parties resulting from their dealings may be enforced, and each of them prevented from using that statute, not as a protection against, but as an effective means of, fraud. Browne, Stat. Frauds, § 116; *Rice v. Roberts*, 24 Wis. 461; *Niland v. Murphy*, 73 Wis. 326; *Pireaux v. Simon*, 79 Wis. 392; *Trowbridge v. Wetherbee*, 11 Allen, 361; *Bowen v. Bell*, 20 Johns. 338; *Remington v. Palmer*, 62 N. Y. 31; *Bork v. Martin*, 132 N. Y. 280; *Hodges v. Green*, 28 Vt. 358; *Gordon v. Tweedy*, 71 Ala. 202; *Negley v. Jeffers*, 28 Ohio St. 90; *Galley v. Galley*, 14 Neb. 174; *Ryan v. Tomlinson*, 39 Cal. 639, 645; *Bibb v. Allen*, 149 U. S. 481, 497.

It will be observed that the above decisions are made under statutes on both sides of the line of distinction pointed out by DIXON, C. J., in *Brandeis v. Neustadtl*, 13 Wis. 142, and the same efficacy is given to completed execution whether the original contract is by the statute merely denied in evidence, or forbidden to be the subject of an action, or, as in New York, Wisconsin, and Nebraska, is declared void. It should also be noted that in the cases above cited, where this court refused to enforce parol agreements for partnerships dealing in lands, the contracts were still executory.

In the contract before us the partnership, long before suit, had been fully executed, so far as any real-estate rights were concerned, in at least two of the three enterprises under-

taken,— the "Log Creek deal" and the "Thornapple deal." Plaintiff had explored and found the land or standing timber, the defendants had bought it, and it had all been either logged or sold, and the proceeds in money had been received. Indeed, in the former a division of the money had been made, not complete only because erroneous in amount. No more complete execution of all parts of the agreement in any wise touching real estate, or affecting any dealings therein, could well be conceived. Defendants had not repudiated the contract as void, but had performed it, and had received money as the fruit of such performance. As to the third enterprise, the "Main Creek deal," a fraction of the land is as yet unsold; but even that has been denuded of its timber, which has been sold, and the proceeds received by defendants. For reasons to be stated later, however, it is not necessary to decide whether such nearly complete execution is sufficient to wholly remove the obstacle of the statute of frauds.

Another question preliminary to the details of the judgment is whether the "Thornapple lands" were within the general arrangement between plaintiff and defendants, or were a separate and independent transaction of the defendants together, or of *H. C. Putnam* alone, in which plaintiff was not a participant. The evidence is in conflict, the parties contradict each other squarely, and there are several items of circumstantial evidence confirmatory of one or the other theory. That being so, the finding of the referee and of the circuit court that they were so included must stand. We certainly do not find that it is opposed to the clear preponderance of evidence.

This brings us to an examination of the situation and the rights of the parties in detail. The situation may be summarized thus: In 1888 a negotiation was had, at which certain terms were agreed on, under which the parties might handle one land or logging enterprise, or might take up others, as they decided in the future. Only one was in act-

ual contemplation at the time. One item of that general agreement was that the profits of each deal were to be divided, and plaintiff's share paid over to him, as soon as it was closed up. Under this arrangement the "Log Creek" enterprise was entered upon in 1888, the "Thornapple" deal in January, 1890, and the "Main Creek" deal in July, 1891. The "Log Creek" enterprise was a purchase of standing timber, a logging thereof, and sale of the logs fully completed,— the money all received and bills all paid by November 12, 1890. The "Thornapple" was a purchase outright of lands, and a sale thereof in bulk the same year, fully completed and price collected by the defendants by April 15, 1891. The "Main Creek" was a purchase of timber lands, logging thereof, and sale of the logs. Those logging operations extended to near the close of 1896, and at the time of trial, in 1898 and 1899, a considerable quantity of the cut lands still remained undisposed of. A small remnant of logs was still "hung up," and to be paid for only as they reached Beef Slough, and some small indebtedness for taxes and trespasses remained unsettled. Each separate enterprise had yielded a measure of clear profit. In June, 1896, the accounts of the Log Creek deal were stated and balanced by *Mr. Thompson*, whose duty that was, and a sum paid over to the plaintiff as his share of the profits, but not so as to make a binding settlement as to correctness of the amount. As early as July, 1896, a statement of the Thornapple accounts was made by plaintiff, and was exhibited to *Thompson*. It apparently did not receive assent or dissent as to correctness, for the reason that plaintiff's interest therein was denied.

In addition to his claim to a share of the net profits in these three enterprises, plaintiff makes claim to certain sums due him as a contractor with the firm for driving certain of the Log Creek logs, and for logging and driving most of the Main Creek logs.

In this situation, it must be conceded that there is no such

settlement of partnership accounts and agreement on balance as is uniformly held to support an action at law. It is also apparent that, as to the Main Creek transactions, the time has not yet come when plaintiff is, by the terms of his contract, entitled to a division of profits. Some debts and some credits still remain to be adjusted, and a not inconsiderable part of the property to be disposed of, before it can be said to be closed up. True, the remaining property is mainly real estate, to which a court might not be able to enforce any rights of plaintiff. But the defendants do not repudiate the rights which he claims. They admit that, whenever they shall have sold that land in accordance with the terms of their agreement, its proceeds are to be accounted for. They have the right to insist that such property be disposed of in the contract method, instead of by a court, so long as they do not unreasonably either negligently or wilfully delay. Further, even if the facts justified a demand by plaintiff that the partnership be terminated by decree of a court, the situation would demand the peculiar powers of a court of equity to take control of the remaining property and dispose of it, and to ascertain and discharge any outstanding partnership indebtedness, before final statement of account and division between the partners can be had. *Green v. Stacy*, 90 Wis. 46, 52. The plaintiff cannot, therefore, in this action, properly demand or recover profits earned or to be earned by the partnership dealings in the Main Creek lands.

We are persuaded, however, that such inability to recover his profits on the last-mentioned enterprise need not preclude him as to the others. While it is a general rule that individual transactions constituting parts of a general partnership business cannot, at the will of either party, be severed from the rest and made the basis of suit either at law or equity, that rule does not prevent the parties from agreeing to such severance, nor preclude courts from enforcing the rights on that basis, if it can be done without involving

the rest of the business, when such agreement is made. *Drew v. Ferson*, 22 Wis. 651; *Rose v. Bradley*, 91 Wis. 619; *Gibson v. Moore*, 6 N. H. 547; *Collamer v. Foster*, 26 Vt. 754. As already stated, the agreement of the parties before us in advance severed each deal from any others, and stipulated that the accounts of each should be settled and its profits divided independently of the others. As each was taken up, there was no certainty that there ever would be another. The conduct of one did not involve any of the transactions in either of the others. Indeed, both the Log Creek and Thornapple enterprises were finished up before the Main Creek was entered upon. In May, 1891, plaintiff might have brought his suit for accounting and division in both of the former, and such suit certainly could not have been abated nor confused by the fact that in July following a new and additional enterprise was taken up, in view of the agreement that each should be settled up upon its completion.

We have reached the conclusion that the parties have by agreement so severed the different transactions that the plaintiff's share of profits therein may properly be ascertained and recovered without involving the incomplete Main Creek enterprise; that defendants did, upon the trial, by conduct, waive their right to object that the ascertainment of the amount due plaintiff involved an accounting between partners, which ought to be had in a suit in equity, and did consent that in this action at law the amount might be tried and decided; and that a money judgment may properly be rendered for the amount so ascertained.

The unpaid balance due for cutting and driving the Main Creek logs is, of course, due at law, on contract, and properly recoverable in this form of action. Its joinder with the claims of plaintiff as a partner, if improper, has been waived by omission to object. Sec. 2654, Stats. 1898.

In stating the accounts, especially of the Log Creek deal, trifling errors in allowance of interest exist, in that the

plaintiff is allowed interest from the date when moneys received by defendants first exceeded the amount due *H. C. Putnam* for his advances. This is erroneous, for plaintiff was not entitled to payment of his share of the profits until the transaction was completed. Such was the contract. In *Laycock v. Parker*, 103 Wis. 161, the rule as to demands such as here involved was stated to be that interest should run from the time when the debtor ought to have paid, which time may be fixed by agreement, by law, or, in the absence of such fixing, by demand. Here the date was fixed by the contract. The Log Creek matter was fully completed by receipt of the last payment for logs on November 12, 1890, from which date, and not earlier, plaintiff is entitled to interest. The dates for the payments for logging and driving were also fixed by contract, and are correctly found and applied by the circuit court. Another slight error consists in allowing interest upon an item of $750, the price of certain logs belonging to plaintiff, and turned into the Log Creek transaction. Defendants are allowed interest as if *Mr. Putnam* had advanced the money, which was not the case; and plaintiff is allowed interest from the date when he turned in the logs, to which he, as partner, was not entitled, there being no agreement that he should receive interest on any contributions he might make. Still another error consists in considering three disbursements made by plaintiff in the Main Creek matter as part of his logging account, while they should be treated as contributions to the partnership undertaking, and be allowed him whenever the partnership accounts come to be stated. Those items are: April 15, 1892, paid by Smith & Howe, $35.40; September 1, 1893, paid to Early, for trespass, $27; February 12, 1895, paid to county, for land, $80.

The so-called Till account is merely one of the firm transactions, showing an item of profit for those accounts when they come to be stated, and should not be, as it is, confused

with plaintiff's claim for driving certain logs. We have, therefore, eliminated it from the amounts we find due, but have included plaintiff's charge of $444.79 for driving the Till logs, and the sum of $525.17 paid him. A statement of the accounts resulting in the amounts for which judgment is ordered will be filed with this opinion, but need not form a part thereof for purpose of publication.

With these corrections, and one or two others too trivial to require mention, we reach the conclusion that there is due plaintiff from defendants, for which judgment should properly be rendered in this action: Profits on Log Creek transaction, $841.32, with legal interest from June 16, 1891; profits on Thornapple transaction, $1,082, with interest from August 15, 1891; and balance unpaid on Main Creek logging and driving account, $506.48, with interest from September 26, 1896.

By the Court.—Judgment reversed, and cause remanded with directions to render judgment in favor of plaintiff for the amounts above indicated.

BARDEEN, J., dissents.

The following opinion was filed June 21, 1900:

DODGE, J. The argument for appellants on their motion for a rehearing calls our attention to certain inaccuracies of statement in the opinion filed, in asserting that defendants first clearly objected to adjudication of amount due in this, a legal action, after confirmation of the referee's report. The "first clear objection" referred to was the motion to amend the answer so as to set up the existence of the partnership as a defense, and it is true that this motion was presented, not after, but at the same time with, the motion to confirm, and was heard and decided with it. This inaccuracy is, however, wholly immaterial to the conclusion reached, that defendants had, by conduct, assented to in-

vestigation and adjudication of the amount due the plaintiff. That conclusion resulted from the voluntary introduction of the evidence as to the accounts after the fact of partnership was fully admitted by plaintiff, continuance of the trial to completion, and the submission to the referee of the rights of the parties for decision upon the pleadings and proofs as they then stood, without objection to the form of action.

Indeed, it is questionable whether such assent might not be inferable from mere procedure with the trial, and even if, at the close of the trial, due attempt to raise the partnership character of the transactions as an objection to the consideration, in action at law, of the rights of the parties, had been made. But that question need not be discussed or answered, for the record discloses no attempt to raise such objection, but, on the contrary, the submission of the merits by both parties to the referee. True, appellants assert that at the close of the evidence they moved, before the referee, for a dismissal on the ground that the claims of plaintiff arose out of unsettled partnership accounts; but no such motion appears of record, nor does the bill of exceptions certify that any was made. We cannot accept any other evidence of such fact, even if material,— not even the affidavit of appellants' counsel.

Other contentions now urged by appellants were fully considered in the original decision of the case, and present no reason for rehearing.

By the Court.— Appellants' motion for rehearing is denied, with $25 costs.

SEGNITZ, Assignee, Appellant, vs. GARDEN CITY BANKING & TRUST COMPANY, Respondent.

107 171
107 451

107 171
d117 404
d117 405

April 28—June 21, 1900.

Voluntary assignments: Bankruptcy: Title to property in another state: Filing of claim by foreign creditor: Estoppel: Corporation a "person:" Construction of statutes.

1. A voluntary, common-law assignment for the benefit of creditors, good in the state where made, carries title to personal property wherever situated, but where the state steps in and regulates the distribution of the assigned estate in accordance with conditions which only the sovereign can prescribe, and the conditions so prescribed are such as to bring into play the essential features of a bankrupt law, the operation of the assignment will be limited to the state where made.
2. Ch. 80*a*, S. & B. Ann. Stats. (providing, among other things, that a debtor who has made a voluntary assignment under ch. 80 may become discharged from his debts as a part of the proceeding under the assignment, and that every creditor residing within or without the state, who accepts a dividend out of the assigned estate, or participates in any way in the proceedings, shall be bound by the order of discharge, subject to the right of appeal), gives the assignment law the character of a bankrupt law, and a deed of assignment executed thereunder does not convey title to personal property in another state, at least as against creditors residing in such state.
3. An Illinois corporation, being indebted to a bank in that state on promissory notes and having on deposit therein money subject to check, made an assignment for the benefit of creditors in this state. When the notes became due the bank applied the money on deposit to their payment and filed a claim in the assignment proceedings for the balance due on the notes. *Held*, that the filing of such claim was merely a recognition of the validity of the assignment so far as it conveyed property in this state, and did not estop the bank from denying its extraterritorial effect in an action to recover said deposit.
4. In view of subd. 12, sec. 4971, and subd. 2, sec. 4972, S. & B. Ann. Stats. (providing that in construing statutes "the word 'person' may be extended to bodies politic and corporate as well as to individuals," and "should be extended and applied to bodies corpo-

rate unless plainly inapplicable"), the provision of sec. 1702*d* that "any person" making a voluntary assignment for the benefit of creditors may be discharged from his debts in the assignment proceeding should be construed to include corporations.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Appeal by plaintiff from an order sustaining demurrer to the complaint. From the complaint, and certain stipulations and concessions added thereto, it appears that in June, 1898, the Krull & Volger Company was a corporation existing under the laws of Illinois, having its principal place of business at Milwaukee, and branch establishments at Chicago, Illinois, and Kansas City, Missouri, and on that day made a due and formal voluntary assignment in Milwaukee, in compliance with ch. 80, S. & B. Ann. Stats., to the plaintiff, *Herman Segnitz*, a citizen and resident of Wisconsin. On that day the Krull & Volger Company had on deposit, subject to check, with the defendant, a banking corporation existing under the law of Illinois and engaged in business at the city of Chicago, $1,652.39, and at the same time was indebted to that company on two promissory notes, of $1,000 each, due, one about June 15, and the other about July 15, 1898. At the opening of business on June 4th the plaintiff formally notified the defendant of the fact of such assignment, and of the claim by him, as such assignee, to the fund then on deposit. Later the defendant made application, by proper entries on its books, of said $1,652.39 to the said promissory notes. Thereafter, and about September 1st, the defendant filed with the clerk of Milwaukee circuit court, in the assignment proceedings, a claim for $347.61, being the balance of said notes remaining after the application of said deposit, which fact is set up as an estoppel of the defendant against denying either the validity of the assignment, or plaintiff's title to any of the assets of said Krull & Volger Company. The defendant has, on demand, refused to pay

said deposit fund of $1,652.39, or any part thereof, to the plaintiff, and this suit is brought by the assignee to recover that amount.

For the appellant there was a brief by *McElroy & Eschweiler*, and oral argument by *F. C. Eschweiler*. They contended, *inter alia*, that a creditor who comes into court here and seeks to take advantage of our laws must be regarded for that purpose as a resident of this state and subject to the rules of law governing a resident creditor. *Cole v. Cunningham*, 133 U. S. 107–115; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409–411; *Denny v. Bennett*, 128 U. S. 489–497. The filing of a claim by the defendant in a voluntary assignment proceeding made him a party to the same and estopped him from questioning either the voluntary assignment itself or the title of the assignee to all the assets of the assignor wherever situated. Burrell, Assignments (5th ed.), 476–479; *Littlejohn v. Turner*, 73 Wis. 113–121; *Boynton F. Co. v. Sorensen*, 80 Wis. 594–596; *Lawson v. Stacy*, 82 Wis. 303–305; *In re Gilbert*, 94 Wis. 108–115; *Keith v. Arthur*, 98 Wis. 189, 191; *Means v. Hapgood*, 19 Pick. 105; *May v. Wannemaker*, 111 Mass. 418; *Mehlhop v. Ellsworth*, 95 Iowa, 657; *Von Stein v. Trexler*, 5 Tex. Civ. App. 299; *Ansonia B. & C. Co. v. Babbitt*, 74 N. Y. 395, 404; *Groves v. Rice*, 148 N. Y. 227, 234. Such filing is a recognition of the assignment *in toto*, and the creditor cannot hold the assignment void in part and good in part. *Geisse v. Beall*, 3 Wis. 367, 399.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*.

BARDEEN, J. The complaint shows that a corporation organized under the laws of Illinois, with its principal office and place of business in this state, made a voluntary assignment for the benefit of its creditors, in this state. The question for decision is whether such assignment carried title to

the personal estate of the assignor, situate in Illinois. The general proposition may be stated that a voluntary, common-law assignment for the benefit of creditors, good in the state where made, carries title to personal property, wherever situated. This court has so held, and such holding is supported by the great weight of authority. *Mowry v. Crocker*, 6 Wis. 326; *Cook v. Van Horn*, 81 Wis. 291; *Campbell v. Colorado C. & I. Co.* 9 Colo. 60; *First Nat. Bank v. Walker*, 61 Conn. 154; *Walters v. Whitlock*, 9 Fla. 86; *Miller v. Kernaghan*, 56 Ga. 155; *Coflin v. Kelling*, 83 Ky. 649; *In re Paige & S. L. Co.* 31 Minn. 136; *Askew v. La Cygne Exch. Bank*, 83 Mo. 366; *Frazier v. Fredericks*, 24 N. J. Law, 162; *Ackerman v. Cross*, 40 Barb. 465; *Noble v. Smith*, 6 R. I. 446; *Gregg v. Sloan*, 76 Va. 497; *Weider v. Maddox*, 66 Tex. 372; *Black v. Zacharie*, 3 How. 483; *Van Wyck v. Read*, 43 Fed. Rep. 716; *Means v. Hapgood*, 19 Pick. 105; *Fuller v. Steiglitz*, 27 Ohio St. 355. In Illinois, Louisiana, and Maine, and possibly some other states, the rule is limited, and will not be allowed to prevail as against creditors of the assignor residing in those states. *Heyer v. Alexander*, 108 Ill. 385; *Beirne v. Patton*, 17 La. 589; *Fox v. Adams*, 5 Me. 245; *Chafee v. Fourth Nat. Bank*, 71 Me. 514. The general rule, however, is as above stated; and if the assignment in question, under the law of this state, was but a common-law, voluntary assignment, it carried title to the assignor's property in Illinois, and the demurrer was improperly sustained.

The assignment under consideration was made June 3, 1898, and the law applicable thereto may be found in ch. 80 and ch. 80*a*, S. & B. Ann. Stats. So far as ch. 80 is concerned, it only assumes to regulate and control the manner in which such assignments shall be made and executed. Ch. 80*a*, however, added some new features, which led this court to speak of our whole system relating to voluntary assignments as an insolvent law. *Holton v. Burton*, 78 Wis. 321; *Second Ward S. Bank v. Schranck*, 97 Wis. 250. In

Binder v. McDonald, 106 Wis. 332, this court criticised these statements, and limited them to the additions made to the general assignment law by the acts of 1889, now included in ch. 80*a*.

This court has never had occasion to examine and construe the purpose and force of those features of our assignment law which enable the debtor to obtain a discharge from his debts. A very similar system in Minnesota was considered in *McClure v. Campbell*, 71 Wis. 350, and it was distinctly held that an assignment made in that state, pursuant thereto, had no extraterritorial effect. Similar statutes have been the subject of frequent discussion in other courts, and the almost uniform line of decisions is in accord with the conclusion stated. Many of the cases are cited and reviewed by the supreme court of the United States in the recent case of *Security T. Co. v. Dodd, M. & C.* 173 U. S. 624. In *Barth v. Backus*, 140 N. Y. 230, and *Townsend v. Coxe*, 151 Ill. 62, the courts of last resort in New York and Illinois had occasion to consider the law of this state, and the legal effect of an assignment thereunder; and both courts came to the conclusion that those portions of our law which enabled the assignor to obtain a discharge from his debts gave it the character of a bankrupt law, and that such an assignment was ineffectual to transfer title to property of the insolvent situate in those states. Of course, we are not bound by those decisions; but, in so far as they rest upon valid reasons and sound conclusions, they are entitled to weight.

Ch. 80, as already noted, only assumes to deal with the making and administration of common-law assignments. Prior to 1889 an insolvent debtor could only obtain a discharge from his debts by procedure under ch. 179,—an act entirely independent of the assignment statutes. This chapter provided for a petition, a schedule of all creditors, and an inventory of property; and, in a proper case, an assignment was directed. Recognizing the futility of such a course

by a debtor who had made a voluntary assignment, in 1889 the legislature adopted the provisions which have been incorporated into ch. 80*a*. The form of procedure was based upon the assumption that the debtor had made a voluntary assignment. Among other features, it provided that such debtor might become discharged from his debts, as a part of the proceedings under the assignment, and that every creditor, residing within or without the state, who should accept a dividend out of the assigned estate, or participated in any way in the proceedings, should be bound by the order of discharge, subject to the right of appeal. If this coercive feature of the scheme had been contained in the original assignment executed by the debtor, it would have rendered the assignment void. It became legal only by force of the statute. Thus, the way was opened to every debtor making an assignment, not only to distribute his property to his creditors, but to demand a discharge from his indebtedness as to every creditor who should come in or accept a dividend. It was, in legal effect, tacking a bankrupt law to the assignment law; and inasmuch as the distribution of the estate depends, not upon the will of the assignor, but upon the positive requirement of the lawmaking power, we can see no escape from the conclusion that in so far it becomes statutory, and not voluntary. It is only in the cases where the making of the transfer and the distribution of the assigned estate are the voluntary acts of the assignor that the law recognizes the extraterritorial effect of the deed of assignment. When the state steps in and regulates the distribution of the assigned estate in accordance with conditions which only the sovereign can prescribe, and the conditions so prescribed are such as to bring into play the essential features of a bankrupt law, the operation of the assignment will be limited to the state where made. No question of comity arises, or, at least, that rule cannot be extended to cases of this kind. We are satisfied

with the proposition that when this assignment was made the bankrupt features of our law were in force and the deed of assignment did not carry title to the personal assets of the assignor in Illinois,—at least, not as against creditors residing in that state. Such being the case, the defendant had a right, after the assignor's notes became due, to apply the money in its hands, *pro tanto*, to their satisfaction.

The fact that the defendant subsequently filed a claim for the balance due, in the assignment proceedings, cannot affect the question. The legal effect of the assignment being only to convey to the assignee the title to such assets as were within this state, the filing of a claim by the defendant only has the effect to recognize its validity to that extent. It creates no greater right in the assignee than was conveyed by his deed. We do not see how any question of estoppel can arise, unless it should arise over some question of administration of the estate actually assigned. Whether the court in which the proceedings are pending may deny the right of defendant, under the circumstances, to participate in dividends, is a question not before us.

What has been said has been based upon the assumption that the words "any person," used in sec. 1702*d*, ch. 80*a*, S. & B. Ann. Stats., may be construed to cover a corporation. This section reads as follows: "*Any person* who shall have made a voluntary assignment for the benefit of his creditors under or in pursuance of the laws of this state, may be discharged from his debts as a part of the proceedings under such assignment, upon compliance with the provisions of this act." Glancing at the following sections of the act, it seems at first as though it was not intended that it should cover corporations, but a consideration of other statutory provisions in connection with several decisions of this court relieves the question of the seeming difficulty. The right of a corporation to make a voluntary assignment is established. *Garden City B. & T. Co. v. Geilfuss*, 86 Wis.

612; *Vanderpoel v. Gorman*, 140 N. Y. 563. In the construction of statutes, it is provided by subd. 12, sec. 4971, S. & B. Ann. Stats., thus: "The word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals." Subd. 2, sec. 4972, says: "The word 'person' should extend and be applied to bodies corporate, unless plainly inapplicable." Instances where the word "person" has been construed to include corporations can be found in the following cases: *Chippewa Valley & S. R. Co. v. C., St. P., M. & O. R. Co.* 75 Wis. 253, note; *Fadness v. Braunborg*, 73 Wis. 279; *Larson v. Aultman & T. Co.* 86 Wis. 286. In view of the statutes mentioned, and the decisions of this court thereunder, we are satisfied that there is nothing in ch. 80*a* which indicates that there was any legislative intent to make them "plainly inapplicable" to bodies corporate.

It follows, therefore, that the order appealed from is proper, and ought to be affirmed.

By the Court.— So ordered.

In re Town of Holland and another.

May 15 — June 21, 1900.

107 178
e114 565

Supreme court: Original jurisdiction: Villages: Validity of incorporation.

An application to test the validity of the incorporation of a village, based on objections that the territory incorporated did not contain the requisite population per square mile, and that a majority of the ballots cast by the electors was not in favor of the incorporation, does not state facts of such wide and public concern as to warrant the exercise of the original jurisdiction of the supreme court.

Application for leave to bring an action in the name of the state. *Denied.*

W. H. Timlin, for the motion. [No brief on file.]

Simon Gillen, *contra.*

PER CURIAM. The town of *Holland*, in Sheboygan county, and *C. J. Huenink*, a taxpayer of said town, ask leave to begin and prosecute an action in this court to test the validity of the organization and incorporation of the village of Cedar Grove. The attorney general was requested to bring such an action, but, after a hearing, declined so to do.

It appears from the petition that the village of Cedar Grove consisted of a tract of land in the town of *Holland* containing two square miles, all in Sheboygan county, and was incorporated by an order of the circuit court on November 14, 1899. The validity of such incorporation is attacked on the ground that the territory incorporated did not contain the requisite population per square mile, and that a majority of the ballots cast at the meeting of the electors to determine upon incorporation was not in favor of the proposition. The officers of the village who appear to oppose this application insist that the facts set forth in the petition are not sufficient to warrant the exercise of the original jurisdiction of this court.

In *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, this court announced the rule that, in all cases in which the exercise of the original jurisdiction of this court is sought, leave must be obtained of the court upon a *prima facie* showing that the case is a proper one for its cognizance. In a later consideration of the same question the conclusion arrived at was that it was not enough to put in motion the original jurisdiction of this court that the question was *publici juris*, but it should also be one "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people," and one, also, in which the interest of the state is primary and proximate, not secondary or remote. *Att'y Gen. v. Eau Claire*, 37 Wis. 400. The rules so established have been frequently reiterated, and the limits under which the original jurisdiction of this court will be exercised so carefully defined that nothing new can be said on the ques-

tion. *State ex rel. Wood v. Baker*, 38 Wis. 71; *State ex rel. Att'y Gen. v. M., L. S. & W. R. Co.* 45 Wis. 579; *State v. St. Croix B. Corp.* 60 Wis. 565; *State ex rel. Radl v. Shaughnessey*, 86 Wis. 646; *In re Hartung*, 98 Wis. 140.

The petition here presented fails to disclose facts of such wide concern as to come within the rules stated. The grievance complained of is merely local, and the circuit court has ample jurisdiction to hear and determine the controversy.

The application is denied.

KENDALL, Receiver, Appellant, vs. BEAUDRY and another, Respondents.

May 15 — June 21, 1900.

Insolvency: Husband and wife: Continuation of business by wife: Rights of husband's creditors.

A husband failed in the logging business, and, in good faith, a third party advanced the wife, who had shown herself thrifty and energetic and able to conduct a small store and hotel, money to continue the business, on condition that she secure the skill and services of her husband, which she did, paying him a salary. *Held*, that such business belonged to the wife, and hence the profits accumulated therefrom, though in a large measure due to the husband's skill and services, are also hers, and are not subject to be taken for the husband's debts.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

The plaintiff, appointed as receiver in supplementary proceedings upon execution against *August Beaudry*, commenced this action in 1896 against the defendants to recover from *Zelia Beaudry* moneys and property in her hands claimed to belong to *August*, her husband.

The facts disclosed, so far as material, were that *August Beaudry* had been a moderately successful laborer and oper-

ator in timber lands up to 1888. He had at that time a homestead, upon which was situated, in one building, a store and saloon operated by himself, the residence of himself and wife, and a boarding house or hotel conducted by her under an arrangement between them whereby she had the proceeds. This homestead was incumbered for about $1,200, and was worth something over $2,000. *August* was engaged also in the business of buying standing timber and timber lands, more especially cedar, and logging the same, in which business he was an expert. In 1888 he suffered a severe loss by fire, and also suffered a disabling personal injury, by the first of which he became insolvent. His creditors commenced to attack him; the defendant *Zelia* became distressed and threatened to separate from him, and do for herself, if that was to continue; whereupon, on February 5, 1889, he transferred to her the entire homestead premises. Thereafter, until sometime in the fall of 1890, she continued to run the hotel, and the store and saloon; not, however, attempting to engage in any lumbering operations. He made such adjustments and apportionments of property among his creditors as he could; turned out to some of them such stocks of lumber or other things as he had on hand, and to others accounts which he had against farmers in the vicinity, and to others he gave mortgages upon the stock in his store to more than its value and upon certain outlying real estate. In the fall of 1890 he transferred to his wife the stock of goods in the store upon her assumption of debts secured thereon of considerably more than the value of the stock. She meanwhile had accumulated an amount somewhat indefinitely stated at $700 or $800 from the proceeds of the hotel business, some of which she used in increasing the stock in the store. Thenceforward all purchases for the store were made in her name, and she operated the same. Shortly thereafter one of the firm of Wright Bros., who had been large customers of cedar

poles and posts from the defendant *August*, visited the *Beaudrys*, examined the situation, saw that it was impossible for *August* to do any business himself, and proposed to *Mrs. Beaudry* to advance her money to purchase cedar lands, the title to be taken in the name of the Wrights, and the product thereof to be turned over to them, they to pay therefor at a price, and she to have whatever could be made in that way, provided she could secure her husband's skill and services, which were deemed valuable. The defendant *Zelia* was a woman of considerable business capacity, and evidently of much independent judgment and opinion. She assented to this arrangement, and in the following January it commenced, the Wright Bros. advancing to her considerable sums, for which she made herself liable. She purchased the supplies necessary, and the logging outfit, and employed her husband at an agreed salary, differently stated at $100 per month and $50 per month; also allowing him to continue the occupation of the saloon upon the homestead premises, which he ran as an enterprise of his own. This lumbering business continued up to the time of the commencement of suit, and therein the defendant accumulated substantial profits, the Wrights extending to her considerable credit, not only in that business, but for other purposes, furnishing the money for her to pay off the debts of her husband against the store, which she had assumed, and to make certain other investments not here called in question. From time to time she paid moneys or securities to her husband to apply upon his agreed compensation, which were by him turned over to various of his creditors. He has never treated as his the moneys or property of the business conducted under her name, or assumed to use the same for his own benefit.

The question principally litigated was as to this lumber business, whether it was in fact the business and property of *Zelia*, or whether her name was merely used therein as a

cover for his business, to keep the property and profits thereof out of the reach of his creditors. The court found that the business and property were hers, and entered judgment for the defendants, from which the plaintiff appeals.

For the appellant there were briefs by *Greene, Vroman, Fairchild, North & Parker*, and oral argument by *Geo. G. Greene.* They contended, *inter alia*, that placing the cedar business and its proceeds in the name of the wife was a fraud on creditors. *Feller v. Alden*, 23 Wis. 301; *Hoxie v. Price*, 31 Wis. 82; *Dayton v. Walsh*, 47 Wis. 113; *Mayers v. Kaiser*, 85 Wis. 382; *Knapp v. Smith*, 27 N. Y. 277; *Abbey v. Deyo*, 44 N. Y. 343; *Martin v. Remington*, 100 Wis. 540; *Ansorge v. Barth*, 88 Wis. 560. Because of the opportunity for and difficulty of proving fraud, the burden is on the wife, in such cases, to prove good faith and valuable consideration paid. *Fisher v. Shelver*, 53 Wis. 498; *Horton v. Dewey*, 53 Wis. 410; *Gettelman v. Gitz*, 78 Wis. 439; *Le Saulnier v. Krueger*, 85 Wis. 214. In such cases the vital question is whether the transaction is sincere or a scheme to keep the husband's property from his creditors. *Hyde v. Frey*, 28 Fed. Rep. 819, 823; *S. Hamill & Co. v. Augustine*, 81 Iowa, 302; *Farmer's Bank of Ky. v. Marshall*, 35 S. W. Rep. 912; *Robinson v. Brems*, 90 Ill. 351; *Hamilton v. Lightner*, 53 Iowa, 470; *Spering v. Laughlin*, 113 Pa. St. 209; *Keeney v. Good*, 21 Pa. St. 349; *Baxter v. Maxwell*, 115 Pa. St. 473; *Trefethen v. Lynam*, 90 Me. 376; *Ansorge v. Barth*, 88 Wis. 560, 563.

For the respondents there was a brief by *Wigman, Martin & Martin*, and oral argument by *P. H. Martin.*

DODGE, J. The evidence is voluminous, conflicting, and confused, and we cannot say that the finding of the court is antagonized by any clear preponderance thereof. The appellant contends that all the earnings in that business are the fruits of defendant *August Beaudry's* skill and services, and therefore should belong to his creditors. This is by no

means strictly an accurate statement of the result of the evidence. Doubtless *August Beaudry's* skill and knowledge of the cedar business were an important element therein, but those alone could not have accomplished the result; for capital was needed in order to make them effective, and capital could not well have been secured by him, certainly not from those who advanced it to the defendant *Zelia.* His situation as a judgment debtor to considerable amounts was such as to deter any investor from starting him in any business of his own; for, however carefully the properties of that business might be preserved in the hands of the lender, the business would be at all times subject to interruption, disturbance, and harassment from those creditors. *Zelia*, on the other hand, invited much more confidence in that respect. She had shown herself to be thrifty and energetic, was able to obtain sufficient measure of credit to supply her camps and to conduct a moderate business, and to this confidence in her in no inconsiderable degree was due the opportunity to render her husband's services productive and useful.

While it has been held, and is undoubtedly the law, that a husband cannot screen the fruits of his own services and exertions under the mere name of another, be that other wife, son, or any one else, if those fruits of his labor are really his (*Tripp v. Childs*, 14 Barb. 85; *Hyde v. Frey*, 28 Fed. Rep. 819), it has nevertheless been decided many times that if the enterprise is in fact that of the wife he may give or hire to her his skill and services, and the fruits of the enterprise will still be hers; that a man's labor cannot be coerced or controlled by his creditors, but may be disposed of by himself, however insolvent he may be (*Dayton v. Walsh*, 47 Wis. 113; *Mayers v. Kaiser*, 85 Wis. 382; *Ansorge v. Barth*, 88 Wis. 553; *Aldridge v. Muirhead*, 101 U. S. 397). These authorities insist on good faith. In ascertaining the existence of this element, the question is whether the debtor

does in fact give or hire his services to another, the fruits thereof to belong to that other, or does he merely exert himself under the color of another's name, with the understanding or purpose that the fruits of his exertion shall be his, but screened by that other's name from his creditors. The former situation satisfies all that is meant by the expression "good faith" in this connection. *Mayers v. Kaiser*, 85 Wis. 396; *Hyde v. Frey*, 28 Fed. Rep. 819. He may be led to so act because of the hopelessness of attempting to devote his efforts to a business of his own, where they would be rendered abortive by the prompt attack of creditors as soon as they became at all productive. Such motive or reason is not inconsistent with the good faith of the transaction. This distinction disposes of the suggestion made by appellant that the learned circuit court took a wrong view of the law, as evidenced by the expression in his opinion: "They had a right to make it her business, and to make it hers for the express purpose of preventing *August's* creditors from getting the proceeds of it, so that none of his nonexempt assets went into it." In the light of the evidence, we read this remark as indicating no more than the consideration above enunciated,—that the peril of interference from creditors may be the reason for an insolvent devoting his services to another instead of attempting to use them for his own benefit, without destroying the good faith of the transaction or that other's title to the fruits of the business. While, of course, transactions between husband and wife should be carefully scrutinized, in the case at bar we are satisfied that the finding by the trial court that the cedar business was in fact that of the wife is sustained by the evidence. Thence results the conclusion that the profits accumulated, though in large measure due to the husband's skill and services, are also hers, and not subject to his debts.

Agreeing, as we do, with the circuit court as to the *bona fides* of *Zelia's* ownership of the lumbering business, no

other issues of importance are presented by the record. The transfer of the stock of goods to her is not assailed except as it is claimed that the consideration paid therefor, considerably exceeding its value, was paid out of the proceeds of the lumbering business, which belonged to him. Having decided that such proceeds did not belong to him, this contention fails. It is not suggested that any rights exist in the plaintiff by reason of the transfer to the defendant *Zelia* of the homestead. Upon the facts found, therefore, it does not appear that the defendant *Zelia* has in her possession or under her control any moneys or property in trust for or belonging to the defendant *August*, or to which the plaintiff as receiver is entitled.

By the Court.— Judgment affirmed.

JOHNSON, Respondent, vs. JOHNSON, Appellant.

May 15 — June 21, 1900.

Divorce: Cruel and inhuman treatment: Appeal: Costs against wife.

1. The fact that a man was of a sullen, morose, and fretful temperament and disposition, rendering him uncompanionable as a husband for months at a time, is *held* insufficient to sustain a divorce under subd. 5, sec. 2356, Stats. 1898, on the ground of cruel and inhuman treatment practiced by other means than acts of physical violence, where the only evidence that the husband's treatment was such as to render it unsafe for the wife to live longer with him was her testimony that she brooded over her troubles until she became very nervous; that she took medicine for such nervousness; but that her health was good "except for such nervousness."
2. In this case the refusal of the clerk to tax the costs on appeal against the respondent wife was reversed.

APPEAL from a judgment of the superior court of Milwaukee county: R. G. SIEBECKER, Judge. *Reversed.*

For the appellant the cause was submitted on the brief of *Christian Doerfler.*

For the respondent there was a brief by *Orren T. Williams*, and oral argument by *L. M. Ogden.*

CASSODAY, C. J. This is an action for a divorce, commenced June 6, 1898. Issue being joined and trial had, the court found as matters of fact, in effect, that the plaintiff and defendant intermarried at Milwaukee, December 27, 1894; that they lived together as husband and wife in Milwaukee until June 28, 1896, when the plaintiff left the defendant, and since that time has not lived with him as husband and wife; that no child was born as the issue of such marriage; that the plaintiff has some property in her own right, and is heir to an interest in her father's estate; that during most of the time she so lived with the defendant she furnished the house in which they lived, and much of the furnishings thereof, and during several months of that time furnished all the money for the support of the family, including the defendant; that during that time the defendant directly or indirectly made application to the plaintiff for money to be invested in some business enterprise or scheme for his benefit, which she declined; that on account thereof the defendant became cold and distant, and subsequently cruel, toward the plaintiff; that while they so lived together the defendant was guilty of cruel and inhuman treatment of the plaintiff, practiced by other means than by acts of personal violence toward her, which rendered it unsafe and improper for the plaintiff to longer live with him as his wife; that the defendant is of a sullen, morose, and fretful temperament and disposition, which unfitted him for months at a time during that time from being a companionable husband to the plaintiff; that the allegations of the complaint charging the defendant with cruel and inhuman treatment of the plaintiff were true as alleged; that during the whole of that time

the plaintiff at all times conducted herself in a proper and becoming manner, performing all the obligations of a faithful wife toward the defendant, notwithstanding the unkind and cruel treatment bestowed upon her by the defendant during much of the same time; that the plaintiff's name before her marriage was Pauline A. Cawker; that no alimony was claimed and none was allowed to the plaintiff herein.

As conclusions of law the court found, in effect, that the defendant was guilty of cruel and inhuman treatment of the plaintiff which entitled her to an absolute divorce; that the plaintiff was entitled to a judgment absolutely dissolving the marriage contract between the parties, and freeing them, and each of them, from all the obligations thereof; that the plaintiff during such marriage at all times treated the defendant in a proper and becoming manner as his wife; that the plaintiff retake and resume her maiden name, Pauline A. Cawker.

From the judgment entered thereon accordingly the defendant brings this appeal.

Of course, the plaintiff is not entitled to a divorce unless she has alleged and proved one of the causes for a divorce prescribed by statute (sec. 2356, Stats. 1898). It appears from the record that the plaintiff had consulted attorneys and made a complaint for a divorce on the ground of cruel and inhuman treatment before she had left the defendant; that after the decision of the court upon the first trial, and upon February 6, 1897, the defendant wrote to the plaintiff that he had a position, and was earning fair wages, and expressed a desire to begin over and live together. Sixteen months afterwards this action was commenced. The only ground upon which the trial court granted the divorce in this case is that the defendant had been guilty of "cruel and inhuman" treatment of the plaintiff practiced by "other means" than by acts of "personal violence." Subd. 5, sec.

2356. The findings of the court go to the extent of holding that his treatment was such as to render it unsafe and improper for the plaintiff to longer live with the defendant as his wife. This is put wholly on the ground that he was of a sullen, morose, and fretful temperament and disposition. The only intimation in the evidence that such temperament and disposition made it unsafe for the plaintiff to longer live with the defendant is that she had brooded over her troubles until she became very nervous; that she took medicine for such nervousness; that she did not complain of such nervousness nor any sickness on the first trial; that she stated on that trial that her health was good; that her health was still good, "with the exception of nervousness;" that it was not true that her health was a great deal better while she lived with the defendant than it was before; that she was quite ill once or twice while living with the defendant, and had a doctor, who gave her medicine for female trouble which she had, but that such female trouble was not the cause of her nervousness. The doctor who so attended and prescribed for her was sworn and examined as a witness, but gave no evidence as to such nervousness. The defendant testified that he continued to cohabit and have intercourse with the plaintiff up to within a week or two of the time when she left him. The only other evidence of ill treatment, aside from his temperament and disposition, is that the defendant on two or three occasions, when angry, drew or shoved the plaintiff's little girl, about six years old, by a former husband, across or upon the floor, but that does not seem to have had any particular influence in granting the divorce.

The question recurs whether the evidence referred to is sufficient to sustain the finding that it was unsafe and improper for the plaintiff to live longer with the defendant. It is very true that a sullen, morose, and fretful temperament and disposition may make a man very uncompanion-

able, but it does not follow that the exhibition of those qualities in the treatment of his wife is necessarily cruel and inhuman treatment, within the meaning of the statute. The decisions relied upon to support the judgment in this case were made in cases where there was either personal violence in fact, or such conduct on the part of the husband as to render it dangerous or unsafe or improper for the wife to continue to live and cohabit with him. *Johnson v. Johnson*, 4 Wis. 135; *Freeman v. Freeman*, 31 Wis. 235; *Crichton v. Crichton*, 73 Wis. 59; *Wachholz v. Wachholz*, 75 Wis. 377; *Hacker v. Hacker*, 90 Wis. 325; *Reinhard v. Reinhard*, 96 Wis. 555. This last case goes as far in support of the judgment as any, and the syllabus may be misleading, if considered without reference to the facts upon which it is based. In addition to having a sullen and morose disposition, and living and sleeping in the same house, and eating at the same table food prepared by the wife, without speaking to her, except in anger, for a period of three months, it was shown that the husband had in that case, six years before, struck the plaintiff; that just before the commencement of the action he had raised his hand in a threatening manner, as if to strike her, stating that if she had not then cause for divorce he would give her cause, and then drove her out of the house; that such treatment was notorious, and observed by others, and caused the plaintiff great sorrow, shame, and disgrace, inducing her to attempt to commit suicide; that by reason of such treatment *her health had been ruined*, and she could not longer remain in the same house with him. Such facts brought the case within the rule frequently sanctioned by the English courts, where it is held that "if force, whether physical or moral, is systematically exerted to compel the submission of a wife in such a manner, to such a degree, and during such length of time, as to injure her health, and render a serious malady imminent, it is legal cruelty, and she will be entitled to a judicial separation." *Kelly v.*

Kelly, L. R. 2 Prob. & Div. 31, on appeal *Id.* 59. And again, "a persistent course of harsh, irritating conduct, unaccompanied by actual violence, but carried to such a point as to endanger the petitioner's health, and renewed after the resumption of interrupted cohabitation, *held* to constitute legal cruelty." *Mytton v. Mytton*, 11 Prob. Div. 141. Those cases were followed in a recent case, argued by Sir Charles Russell a short time before being made lord chief justice of the queen's bench, where the facts relied on to establish the charge of cruelty consisted of a long course of systematic neglect and insult, to the effect that the husband refused to allow his wife to occupy the same room with him or to go out with him; that he was frequently absent, and refused to give any account of his absences; that he told her he hated her presence, frequently using violent language, and threatening to leave her if she did not do as he wished; that "*her health rapidly failed* during her married life, and, in the opinion of her medical attendants, her husband's conduct, and the mental distress and anxiety caused by her marital relations generally, accounted fully for the serious condition in which they found her," and hence constituted legal cruelty and good ground for a divorce. *Bethune v. Bethune* [1891], Prob. Div. 205.

The evidence in the case at bar fails to show that the treatment of the plaintiff by the defendant was "cruel and inhuman," within the meaning of those words as used in our statute cited.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with direction to dismiss the complaint.

The respondent objected to the taxation of costs in favor of the appellant on the ground that she was not liable therefor, and the clerk sustained the objection and refused to tax said costs and insert the same in the judgment. On Sep-

tember 4, 1900, the appellant moved to review his action in that regard.

For the motion there was a brief by *Christian Doerfler*, and oral argument by *C. E. Whelan*. They argued that the clerk had no discretion in the matter, and should have followed the order of the court and taxed costs in accordance with secs. 2949, 2952, Stats. 1898. There is no reason growing out of the identity of the parties why the husband prevailing should not have costs against the wife. 2 Bishop, Marriage, Div. & Sep. § 815. Where the wife has separate property or a separate income, costs in divorce suit may be awarded against her. *Miller v. Miller*, L. R. 2 Prob. & Div. 13; *Milne v. Milne*, L. R. 2 Prob. & Div. 202; *Word v. Word*, 29 Ga. 281; *Balkum v. Kellum*, 83 Ala. 449; *De Rose v. De Rose*, 1 Hopk. Ch. 100; *Brinckle v. Brinckle*, 6 Weekly Notes Cases, 205.

On September 25, 1900, the clerk's ruling was reversed with $10 costs, and he was directed to tax costs for appellant pursuant to the mandate.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, vs. OSHKOSH, ALGOMA & BLACK WOLF RAILROAD COMPANY, Respondent.

May 15 — June 21, 1900.

Railroads: Incorporation to carry passengers only: Eminent domain: Condemnation of land: Construction of statutes: "Or" construed "and."

1. Sec. 1820, S. & B. Ann. Stats. (authorizing the formation of corporations for "constructing, maintaining and operating railroads for public use in the carrying of persons *or* property"), does not authorize the formation of a railroad corporation for the purpose of carrying persons only, the intention being, in view of the other statutory provisions relating to railroads, that corporations organized

thereunder should be common carriers in the fullest sense of the term, and should carry either persons or property as the occasion might require.

2. There being no authority in sec. 1820, S. & B. Ann. Stats., for the formation of a railroad corporation for the carriage of passengers only, such a corporation could not exercise the power of eminent domain, conferred by sec. 1828 upon corporations organized under said sec. 1820, and could not, therefore, condemn a right of way across a railroad previously constructed.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

On the 28th day of June, 1898, articles of incorporation of the *Oshkosh, Algoma & Black Wolf Railroad Company* were filed in the office of the secretary of state, under sec. 1820, S. & B. Ann. Stats. The articles stated that the corporation was formed "for the purpose of constructing, maintaining and operating a railroad for public use *in the conveyance of persons.*" The railroad to be constructed by the corporation so attempted to be formed was stated in the articles to be about 1.7 miles in length, running from a point of junction with the line of the Citizens' Traction Company (an electric street railway line) at the city limits of the city of Oshkosh, through the towns of Algoma and Black Wolf, in Winnebago county, to a point in section 1 on the shores of Lake Winnebago, in said town of Black Wolf.

Immediately after the filing of its articles, the new corporation filed in the circuit court for Winnebago county a petition for the purpose of condemning a strip of land sixteen feet in width across the right of way of the main track of the *Chicago & Northwestern Railway Company*, such strip being a part of a highway which crosses said *Chicago & Northwestern* right of way, and being desired for crossing purposes. Commissioners were appointed, who found it necessary to take the sixteen-foot strip for crossing purposes, and who also determined the points and manner of the crossing, and authorized the carrying of trolley wires over the

crossing, and fixed the compensation to be made for the right of way and crossing. The *Chicago & Northwestern Railway Company* appealed from the award, and, upon the trial of the appeal, moved to dismiss the proceedings upon various grounds,—among others, upon the ground that the petitioner was not a corporation entitled to condemn the lands of the defendant, or to cross its railway. The objections being overruled, the defendant declined to introduce any evidence, and the appeal was dismissed, from which judgment of dismissal the *Chicago & Northwestern Railway Company* appeals.

For the appellant there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *John T. Fish*. They argued, among other things, that the court erred in holding that the petitioner was a public corporation with the right of eminent domain. *Wisconsin W. Co. v. Winans*, 85 Wis. 26; *Mansfield, C. & L. M. R. R. Co. v. Clark*, 23 Mich. 519. The title to no part of appellant's right of way carrying the main track can be taken by condemnation proceedings. Subd. 6, sec. 1828, and secs. 1851, 1854, Stats. 1898; *Toledo, A. A. & N. M. R. Co. v. D., L. & N. R. Co.* 62 Mich. 564; *Winnebago F. Mfg. Co. v. W. M. R. Co.* 81 Wis. 389; *Clay v. Pennoyer Creek I. Co.* 34 Mich. 207; *Fox v. Holcombe*, 34 Mich. 300; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418; *Smith v. C. & W. I. R. Co.* 105 Ill. 511, 513.

For the respondent there was a brief by *Miller, Noyes, Miller & Wahl*, and a separate brief by *Eaton & Weed*, and oral argument by *H. I. Weed* and *Geo. H. Noyes*. They contended, *inter alia*, that the crossing sought was a public use. *Independent Order of F. v. United Order of F.* 94 Wis. 234, 239, 240; *Schroeder v. D., G. H. & M. R. Co.* 44 Mich. 387; *McAuley v. C., C. & I. C. R. Co.* 83 Ill. 348; *Farnham v. Delaware & H. C. Co.* 61 Pa. St. 265; secs. 1820, 1828, 1845, 4181, Stats. 1898; *Butte, A. & P. R. Co. v. M. U. R. Co.* 16

Mont. 540, 50 Am. St. Rep. 508; *Talbot v. Hudson*, 16 Gray, 417; *Aldridge v. T., C. & D. R. Co.* 2 Stew. & P. 199, 23 Am. Dec. 307.

WINSLOW, J. Several questions are presented by the record in this case, but we shall consider only one of them, for the reason that the view which we feel compelled to take of that question renders it unnecessary, and even improper, to discuss the others. The question so presented, and which will be considered, is whether, under sec. 1820, S. & B. Ann. Stats. (now sec. 1820, Stats. 1898), a railroad corporation for the conveyance of *persons only* can be legally formed. If this question must be answered in the negative, then there was no jurisdiction to entertain the attempted condemnation proceedings, because the petitioner was formed for the sole purpose of conveying persons. We entertain no doubt that this question must be so answered.

Sec. 1820 provides that: "Any number of persons not less than five may form a corporation for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons *or property* . . . by making articles of organization in which shall be stated: (1) The name of the corporation; (2) the place from and to which such railroad is to be constructed or maintained and operated as the case may be," and certain other details as to the length, location, capital stock, and number of directors of the corporation, which are unnecessary to be stated at length. Such articles are required to be filed with the secretary of state, and thereupon a patent is to be issued by the governor, upon the issuance of which the organization becomes a corporation, with the powers and privileges of railroad corporations under the provisions of ch. 87, S. & B. Ann. Stats. (now ch. 87, Stats. 1898). Sec. 1828 of such chapter grants to all corporations so formed full powers of condemnations of lands, as well as the power to cross and

intersect railroads theretofore constructed, under certain conditions; and subsequent sections of the same chapter contain specific provisions regulating the manner of exercising the power of eminent domain.

The argument in favor of the petitioner is that sec. 1820, by its words, gives the right to organize a railroad corporation for the purpose of conveying "persons *or* property," and that the natural meaning of this language is that it may be organized for either purpose alone, and that, if it was intended that both persons and property must be carried by every corporation organized under the section, the language should have been in the conjunctive, viz. persons *and* property. Were there no other provisions bearing upon the subject in the statute, this argument would be quite strong; but when we come to consider the duties which the legislature, in the same chapter, has imposed upon railroad corporations formed under it, such a construction becomes plainly impossible. Thus, by sec. 1799, S. & B. Ann. Stats., "every railroad corporation" is required to receive all grain offered to it for shipment, give a bill of lading therefor, and transport the same; by sec. 1799*a*, "every railroad corporation" is required to receive and transport live stock; by sec. 1800, it is required, under certain conditions, to transport firewood; and by sec. 1798, "*every* railroad corporation" is required, upon reasonable notice, to furnish cars to any person applying therefor, for the transportation of freight, and to transport the same with reasonable dispatch, and provide suitable facilities for the receiving and delivery of the same at its stations. All these provisions, and other provisions in the same chapter with regard to fences, cattle guards, and other police regulations, are made, by their terms, to apply to *every* railroad corporation organized under sec. 1820. Again, in enumerating the corporate powers of such a corporation, subd. 7 of sec. 1828 provides that every such corporation shall have power "to take and convey persons or property

over their railroad by the power or force of steam or of animals, or by any mechanical power, and to receive compensation therefor, and to do all business incident to railroad corporations."

A review of all these provisions leaves no doubt in the mind that the legislative intent was that a railroad corporation formed under ch. 87 was to be carrier of both freight and passengers, and that, when it was said that a corporation might be formed for the purpose of carrying persons or property, it was not meant that it might limit itself to the carriage of persons only or property only, but that it might carry either persons or property as the occasion arose.

This view is further strengthened by consideration of the fact that, by subsequent provisions of the statute (secs. 1862, 1863, S. & B. Ann. Stats.), street railways are differentiated from general railroad corporations, and required to be organized under the general corporation law, and not under ch. 87, and are authorized, under certain restrictions and limitations, and upon obtaining authority from local municipalities, to lay their tracks upon the streets of municipal corporations and the highways of adjoining towns. Furthermore, it appears that, by ch. 251 of the Laws of 1897 (sec. 1863*a*, Stats. 1898), such street-railway corporations were given the right of eminent domain, excepting, however, that no power was given to lay their tracks across the tracks of a steam-railway company. These provisions seem to make it clear that the railroad corporation authorized by sec. 1820 was intended to be a general railroad corporation for the carriage of passengers and freight,— a common carrier in its fullest sense,— and to it were given the fullest provisions for condemnation of lands, as compensation for the great public duties imposed upon and assumed by it, and that street-railroad corporations, for the carriage of passengers, were intended to be a separate class of carriers, with limited duties, and correspondingly limited provisions and powers.

By allowing what is really a street-railroad corporation for the carriage of passengers only to be formed under ch. 87, the evident purpose of the statutes would be evaded, and the result would be that confusion would be introduced into the statute, and that a corporation would be endowed to the fullest extent with the great powers of eminent domain, without assuming the public duties and responsibilities, which, in the eye of the law, form the consideration for so great a gift.

Having thus reached the conclusion that sec. 1820 does not authorize the formation of a railroad corporation for the purpose of carrying persons only, and such being the avowed purpose of the organization of the petitioner, it necessarily follows that it cannot maintain this proceeding.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the condemnation proceedings.

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116	2 58

HOLLISTER and another, Appellants, vs. BELL, Respondent.

May 15—June 21, 1900.

Practice: Action at law: Equitable relief: Married women: Promissory notes: Payment of husband's debt.

1. In an action brought and tried as an action at law, such relief only is obtainable as the facts warrant in that form of action.
2. Since a married woman has not capacity to bind herself at law by contract, except as regards her separate property and business, in the absence of a showing that she received any consideration or benefit, directly or indirectly, or that the payee changed his situation to his prejudice on the faith of it, no recovery can be had in an action at law on a note given by a married woman solely for the purpose of securing or paying the debt of her husband.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action at law to recover of a married woman on her promissory note. The question presented for adjudication

was whether the note was given by defendant concerning her separate property or business or merely for the debt of her husband. The evidence was to the effect that plaintiffs, as bondsmen for defendant's husband and one Gill on a building contract, became liable to and did pay the sum of $1,700, by reason whereof the principals became indebted to them to that amount; that defendant gave the note to cover, in part, such indebtedness, she receiving no consideration therefor whatever. There was some evidence to the effect that defendant said, before the note was given, that it was her duty to pay $600, the amount called for by the note. There was also evidence to the effect that some of the money received on the building contract was applied by defendant's husband on a note to which she was a party; also evidence that before plaintiffs made the payment of $1,700, defendant promised to give the note. At the close of the evidence plaintiffs' counsel requested a finding as to whether defendant gave the note in consideration of money applied to her use, which was represented by the loss sustained by the bondsmen; also whether plaintiffs settled their liability as bondsmen in consideration, in part, of the note in suit. The requests were denied. A verdict was directed for the defendant, and judgment was rendered accordingly.

For the appellants there was a brief by *Barbers & Beglinger*, and oral argument by *Fred. Beglinger*.

For the respondent there was a brief by *Eaton & Weed*, and oral argument by *H. I. Weed*.

MARSHALL, J. A married woman has not capacity to bind herself at law by contract, except as regards her separate v or business. It follows, as has often been decided ourt, that a married woman's note, given solely for ose of securing or paying the debt of a third person, at law and not enforceable in equity against her property in the absence of some equitable consid-

erations rendering such enforcement, under the circumstances, just. *Krouskop v. Shontz*, 51 Wis. 204; *Kavanagh v. O'Neill*, 53 Wis. 101; *Emerson-Talcott Co. v. Knapp*, 90 Wis. 35; *Mueller v. Wiese*, 95 Wis. 381.

There is no controversy here but that the note in suit was given by respondent for her husband's debt, and that it did not create any legal claim against her. It is insisted, however, that there was evidence from which the jury might reasonably have found that respondent gave the paper in consideration of benefits which she had received out of the building contract, and that appellants settled their bond liability in consideration, in part, of the note, and that on such facts they were entitled to equitable relief against the respondent's property.

The idea that a plain action at law, as to which there is an entire failure of proof, can be turned into an action in equity and a recovery be had such as that jurisdiction in any event can afford on the facts, does not find support in the decisions of this court. If an action be brought and tried as an action at law, such relief only is obtainable as is afforded on the facts in that form of action. *Mueller v. Wiese, supra; Smith v. Putnam, ante*, p. 155.

If the practice were otherwise than as indicated, it would not avail the appellants in this case, because the evidence does not show or tend to show, either that respondent received any consideration or benefit, directly or indirectly, for the note, or that appellants changed their situation to their prejudice on the faith of it. Granted that some of the money from the building contract was applied by the respondent's husband in payment of a note to which she was a party, the evidence shows that such note was given without consideration as to the respondent,— that it was given the same as the one in suit, for her husband's debt, and that she was not bound by it legally or equitably. Granted, also, that appellants settled the bond liability after respondent

agreed to give the note in suit, the evidence shows that such liability was not changed in the slightest degree by any act of the respondent, and that when they settled it, paying the sum of $1,700, they merely did what they were legally bound to do, independent of any transaction between them and the respondent. So, in any view of the case, the verdict was properly directed, and the judgment must be affirmed.

By the Court.— So ordered.

RHYNER, Respondent, vs. THE CITY OF MENASHA, Appellant.

May 16 — June 21, 1900.

Special verdict: Instructions to jury: Municipal corporations: Defective streets: Personal injuries: Negligence: "Ordinary care:" Intoxication: Contributory negligence: Notice: Measure of damages.

1. When a special verdict is to be rendered, instructions, whether asked by the parties or given by the court, appropriate to each question, should be submitted to the jury in immediate connection with the question to which they are, respectively, applicable, and a failure in that regard is error. Instructions only applicable to a general verdict should not be given.
2. Under sec. 1339, Stats. 1898 (imposing responsibility on the municipality for any damage which shall happen to any person by reason of the insufficiency or want of repair of any street within its limits), a special verdict, finding in the disjunctive that the street was "in a defective or dangerous condition *or* out of repair," without any other fact to support it, fails to show actionable negligence and is fatally defective; and the fact that the finding is in the words of sec. 20, subch. VIII, of the city charter (ch. 123, Laws of 1891), which does not assume to impose any liability on the city but merely relates to notice, does not render it sufficient.
3. A hole in the street, close to the sidewalk, was two feet long and fifteen inches wide, in the shape of a half moon, and had apparently been caused by the washing of surface water escaping from the street. Its dimensions and the duration of its existence were sharply in dispute. *Held*, that it was not, as matter of law, such a defect as would make the city absolutely liable for a personal injury caused thereby.

107 201
108 90

107	201
112	[1] 65
d112	[2]214
112	[2]215
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113	[3]335
107	201
114	[1] 37
114	[1]457
114	[1]598

4. In such case it is error not to submit, as part of the special verdict, a question as to whether the city authorities ought, under all the circumstances, reasonably to have anticipated that an accident might happen and injury be sustained by travelers in the street,—the court's attention having been directed to the matter by a request for the submission of an objectionable question embodying the idea.

5. In an action for personal injuries from a defective street, an instruction that "Negligence means this: It means a want or lack of ordinary care and prudence. Ordinary care and prudence is such care and prudence as is exercised by the mass of mankind in their own daily affairs," without qualification or limiting it to the same or similar circumstances to those in issue, is error; and such error is not cured by afterwards correctly instructing the jury that ordinary care and prudence means such care and prudence as persons of ordinary care and prudence exercise under similar circumstances.

6. Where, in an action for personal injuries from a defective street, the issue of plaintiff's intoxication is submitted to the jury, the defendant is entitled to an instruction that, if plaintiff was intoxicated, such intoxication is evidence from which the jury may infer that plaintiff was guilty of contributory negligence, the instruction being requested in conjunction with another connecting such intoxication with the accident.

7. Where, in an action against a city for an injury from a defective street, the evidence shows that the plaintiff was very much intoxicated at the time of the accident, it is a question for the jury, under proper instructions, whether, under all the facts and circumstances in the case, such intoxication contributed to produce the injury.

8. Sec. 20, subch. VIII, of the charter of the city of Menasha (ch. 123, Laws of 1891) provides that the city shall not be liable for damages for injuries from defective streets, unless it be shown that one of the aldermen had actual knowledge of the defect, or unless the defect shall have existed three weeks, provided that knowledge shall not be presumed from the lapse of such period. *Held*, that actual knowledge not being relied upon and the existence of the defect being for the jury, an instruction to the jury that if they found the defect had existed for three weeks prior to an injury therefrom they might presume and find the city had knowledge thereof, is erroneous: the instruction should have been so framed as to permit the jury to find whether, under all the facts and circumstances of the case, the conditions were such as to bring constructive notice home to the city.

9. In an action against the city for a broken leg caused by a defective street, happening in November 1891, it is error to admit the evidence of plaintiff's physician that he performed an operation on plaintiff's leg in the summer of 1893 for which he charged $100, there being no testimony showing any necessary or causal connection between the injury and the subsequent operation.

10. Where, in an action against a city for an injury caused by a defective street, a witness testifies that he passed the place of accident while plaintiff was lying there, but that it was too dark to recognize who was there, it is error to afterwards recall the witness and permit him to testify, over objection, that he saw no indications that the man lying there was drunk.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The plaintiff brings this action to recover damages for injuries sustained by him by reason of his having fallen in a hole in one of defendant's streets. The defect shown was a hole close to the sidewalk, about two feet long and fifteen inches wide, in the shape of a half moon, apparently caused by surface water from the street running under the sidewalk. The hole was unguarded. Plaintiff was passing along the street on a dark, rainy evening, and his hat blew off. Upon returning from the pursuit of his hat, he stepped into the hole, and broke his leg. The plaintiff's proof showed the hole had existed from a few weeks to several months. The answer was a general denial.

The jury found the following special verdict: "(1) Did the plaintiff sustain the injury at the time and place alleged and claimed by him? Yes. (2) If you answer the first question, 'Yes,' then answer the following: Was the said street at the place where the plaintiff claims to have been injured at the time in a defective or dangerous condition or out of repair? Yes. (3) Did such injury happen to the plaintiff by reason of the defective or dangerous condition or want of repair in said street? Yes. (4) Was plaintiff's injury caused by the negligence of the defendant? Yes.

(5) If you answer the third question, 'Yes,' then answer the following question: Had such defective or dangerous condition or want of repair of said street existed for three weeks or more previous to the happening of said injury? Yes. (6) At the time of the injury, and some time before, had the plaintiff knowledge of such hole and condition of said street? Yes. (7) Was the plaintiff guilty of a want of ordinary care and prudence which contributed proximately to the injury? No. (8) Was the plaintiff intoxicated at the time he received the injury? Yes. (9) If you answer the last question, 'Yes,' then answer the following question: Was the plaintiff at the time he received the injury so intoxicated as to be incapable of managing and conducting himself with ordinary care and prudence? No. (10) [Omitted. Not answered.] (11) If the plaintiff is entitled to recover, at what sum do you assess his damages? Eight hundred dollars ($800.00)."

The plaintiff submitted fourteen requests for instructions, all of which were given. Defendant asked the court to instruct upon forty-three separate propositions of law, some of which were given as requested, others modified and then given, and the remainder refused. The court also gave brief instructions as to each question. The record fails to disclose at what stage of the proceedings the requested instructions were given. A motion for a new trial was denied, and judgment was entered for plaintiff, from which the defendant has taken this appeal.

For the appellant there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck*.

For the respondent there was a brief by *Eaton & Weed*, attorneys, and *A. E. Thompson*, of counsel, and oral argument by *M. H. Eaton*.

BARDEEN, J. A great multitude of questions are raised on this appeal. The defendant complains that evidence

was improperly received; that improper instructions were given, and proper ones refused; that the special verdict is bad; that the question as to the alleged defect in the street, with the jury's answer thereto, does not find actionable negligence; that the question of contributory negligence was not properly submitted; and that under the evidence the answers to some of the questions are inconsistent. In fact there are very few things that transpired during the course of the trial against which some complaint is not made. We have no desire or disposition to scold or lecture counsel or the trial court, but there are some things in this record justly open to criticism, and sufficient to call for a protest on our part against their repetition. In order to consider and determine the many questions raised on this appeal, it is necessary to review the charge to the jury and its application to the several questions of the special verdict. It is impossible to tell from the record just what instructions the court gave with reference to any single question in the verdict. In the general charge the court refers to the several questions, and does little more than state the claims of the respective parties, with an admonition to the jury to find the facts according to the evidence.

Turning, now, to the plaintiff's requests, we find a list of fourteen distinct propositions of law, which the record recites were given, and to which the defendant excepted. Many of these requests contain abstract propositions of law, proper to have been given had the case been submitted on a general verdict, but distinctly improper when a special verdict is required. Not one of them is addressed to any particular question, although some of them would have been proper had they referred to and been given when the jury's attention was being directed to the particular fact for decision. The record fails to show at what stage of the proceedings these requests were given, or whether they were given with reference to any particular question. The rule

which commends itself to our judgment is as stated in *McDermott v. Jackson*, 102 Wis. 419, and *Schaidler v. C. & N. W. R. Co.* 102 Wis. 564: "If a special verdict be rendered, the instructions appropriate to each question, whether asked by the parties or given by the court of its own motion, should be submitted to the jury in immediate connection with the questions to which they are, respectively, applicable. This is the only way in which the jury can obtain an intelligent appreciation of the legal propositions which are to govern them in answering the various questions." This rule is self-evident, and a failure to observe it tends to confusion, and is likely to lead to harmful results. As noted, several of the propositions requested were mere legal abstractions, correct as propositions of law and applicable in case of a general verdict, but of no helpful value to the jury in the decision of the questions of fact in the case. The object of a special verdict is to obtain from the jury answers to certain questions of fact, without regard to their legal effect upon the rights of the parties, and thus obtain a result as far as possible free from sympathy or prejudice. The giving of instructions only applicable to a general verdict tends to defeat that object, and undermines the foundation upon which a special verdict should stand. *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215. The errors in this regard are greatly increased when we come to consider the defendant's requests. In a thicket of some forty-three distinct propositions so requested, there are many susceptible to the objections already stated. Some were given and some refused, and it is only after a laborious search through the case, assisted by the record, are we able to determine that result. This difficulty emphasizes the necessity of the rule stated that all the instructions with reference to a given question should be grouped and given at one time, and so preserved in the printed case that this court will not be compelled to go on a hunt to ascertain the law given to the jury. These reflec-

tions are not made in a spirit of fault-finding, but to indicate how difficult it is to determine just what instructions were actually given with reference to any particular question in the verdict.

Question No. 2 of the verdict, and the answer thereto, are as follows: "Was the said street at the place where the plaintiff claims to have been injured at the time in a defective or dangerous condition or out of repair?" "Yes." The objection suggested to this finding and to the verdict is that it does not cover any fact which establishes the city's liability under the statute. The city's liability is imposed by sec. 1339, Stats. 1898, which makes it responsible for any damage which shall happen to any person "by reason of the insufficiency or want of repairs" of any street within its limits. Under this section, the test of the city's liability is whether such street was in a reasonably safe condition for use. A street may be defective or out of repair and still be in a reasonably safe condition for travel. Hence the finding in the disjunctive that the street was "in a defective or dangerous condition or out of repair," without any other fact to support it, fails to show actionable negligence. It is not enough to say that the court properly instructed the jury as to the measure of the defendant's liability. The verdict on its face must find the *facts*, or it is fatally defective. *Kucera v. Merrill L. Co.* 91 Wis. 637. But it is said that this finding is in the words of the charter of the city (sec. 20, subch. VIII, ch. 123, Laws of 1891), and is therefore sufficient. That section does not assume to impose any liability upon the city, but merely relates to the question of notice.

The defect complained of was a hole about two feet long and fifteen inches wide, in the shape of a half moon, and close to the sidewalk. It had apparently been caused by the washing of surface water escaping from the street. Its dimensions was a matter sharply in dispute, as was also its existence for any great length of time in the condition tes-

tified to by plaintiff's witnesses. Considering the size and location of the hole, the court would not have been justified in holding as a matter of law that the street was not in a reasonably safe condition for use. That was a question properly for the determination of the jury, under all the facts in the case. In view of these facts, the defendant asked the court to submit this question: "Might it reasonably have been expected that such an injury would result therefrom?" While the question was objectionable as limiting the elements of anticipation to "such an injury," yet it was sufficient to direct the court's attention to the matter, and a question ought to have been submitted embodying the idea of whether the city authorities ought, under all the circumstances, reasonably to have anticipated that an accident might happen and injury be sustained by travelers in the street.

A multitude of objections are urged against the charge of the court, some of which will now be noticed. By question 4 the jury found that plaintiff's injury was caused by defendant's negligence. The court charged the jury as follows: "Negligence means this: It means a want or lack of ordinary care and prudence. Ordinary care and prudence is such care and prudence as is exercised by the mass of mankind in their own daily affairs." A similar instruction was condemned in the recent case of *Boelter v. Ross L. Co.* 103 Wis. 324. But to further confuse the case, the court, at defendant's request, and with reference to the standard by which plaintiff must act, instructed the jury that "ordinary care and prudence means the care and prudence which persons of ordinary care and prudence exercise under similar circumstances." This was correct, but, considered in connection with the one above referred to, it left the jury without any very definite idea of what ordinary care really meant. In cases of this kind, the same standard of care is required of both plaintiff and defendant, and is such as the

surrounding circumstances seem to require, and not such as men usually exercise in their daily affairs.

Several objections are made to the manner in which the issue of plaintiff's intoxication was submitted to the jury. In his general charge the court admonished the jury to find the fact according to the evidence whether he was drunk, and whether the intoxication was such as to render him incapable of exercising ordinary care. The first question was answered in the affirmative, and the latter in the negative.

At the request of the parties the court gave a number of instructions covering the questions of intoxication and plaintiff's duty to exercise care, but it does not appear that they were addressed to any particular question in the verdict. We cannot notice all the objections that are taken. The fact that the court did not apply the instructions requested and given to the question to which they were applicable was distinct error, as already noted.

The court instructed the jury that the burden of proving intoxication was upon the defendant, as was the burden of showing that by reason thereof the plaintiff did not exercise ordinary care, and that they could not "assume contributory negligence in the absence of satisfactory proof on that point." In this connection the court refused to instruct that, "if plaintiff was intoxicated, such intoxication is evidence from which the jury may infer that plaintiff was guilty of contributory negligence." There can be no doubt of the rule that negligence may be inferred from circumstances, and while, as a matter of law, intoxication is not contributory negligence, or conclusive evidence of such negligence as will prevent a recovery, still such intoxication is evidence of negligence from which the jury are at liberty to infer such negligence as will bar the action, if the attendant facts so warrant. The defendant was entitled to the instruction asked in view of a further instruction asked and refused

which connected such intoxication with the accident. Beach, Contrib. Neg. § 390; *Seymer v. Lake*, 66 Wis. 651.

Another objection to the finding as to intoxication arises from the evidence. The plaintiff and his witnesses deny that he was intoxicated. Of the defendant's witnesses, the doctor who treated plaintiff immediately after the accident says he was "pretty drunk." The bridge tender, who was near the place of the accident, said he was "pretty well drunk," and that he saw him stagger and fall down. Another witness saw him lying on the sidewalk shortly before the accident, and offered to help him up. His estimate of his condition was that he "was good drunk." A hotel keeper at whose place the plaintiff called between four and five o'clock in the afternoon testified that he staggered and held himself up on the chairs; that he was drunk, and "very staggery." One or two others saw him in the same condition. Several men also testified to conversations with plaintiff after the accident, in which he admitted his intoxication. Substantially all of the witnesses agree that his condition was such that he staggered and was unable to control himself.

The point is made that, if there was evidence sufficient to show intoxication as the jury found, the same evidence shows that he was in such a state of intoxication as to be unable to properly care himself, and that the finding of the jury that he was not so intoxicated as to be incapable of conducting himself with ordinary care is contrary to the evidence and inconsistent. There is considerable force to this suggestion. In the light of the evidence, it is difficult to see how the jury arrived at the conclusion stated. The overwhelming weight of evidence is that he was so intoxicated as to be incapable of caring for himself. Whether such intoxication contributed to produce the injury was a question for the jury under proper instructions and a consideration of all the facts and circumstances in the case.

By the fifth finding the jury found that the defective condition of the street had existed three weeks or more previous to the accident. At the request of the plaintiff the court instructed the jury that, if they found that this condition had existed three weeks or more prior to the date of the accident, they might presume and find that the defendant had knowledge thereof, and was liable for such damages as the plaintiff sustained, if he was in the exercise of ordinary care. This question, and the instruction thereunder, was submitted in view of a provision of the city charter which provides that "the city shall not be liable for damages in such cases, . . . unless it be shown that previous to the happening of the same, one of the aldermen of the city of *Menasha* had knowledge thereof, and no knowledge of such condition of the same should be presumed, unless the defect existed three weeks before such damages accrued, provided, however, that nothing here contained shall be so considered as to mean that knowledge shall be presumed because such three weeks had elapsed." Sec. 20, subch. VIII, ch. 123, Laws of 1891.

A similar provision in the charter of the city of Oshkosh has been construed in several cases in this court. *Studley v. Oshkosh*, 45 Wis. 380; *Sullivan v. Oshkosh*, 55 Wis. 508; *Adams v. Oshkosh*, 71 Wis. 49. In the *Studley Case* we read: "But we cannot think that the legislature intended to relieve the city of Oshkosh from all liability for injuries caused by defective streets therein, unless notice in fact of such defects be given to an alderman of the proper ward, in a case in which the defect is patent, and readily discoverable upon due official examination and inspection of the streets. In such a case we think the legislature intended, in the absence of actual notice to the alderman, to give the city three weeks in which to discover and remove the defect, and, failing to do so in that time, to hold the city liable for the consequences of its negligence." In the *Sullivan Case* it is said: "Under this section it is necessary for the plaintiff (in the

absence of proof of knowledge of the defect by an alderman of the ward) to show that the defect had in fact existed for three weeks or more before the accident, and in addition such other facts as would charge the aldermen or other proper authorities of the city with notice of such defect. The fact that the defect had existed for three weeks had no more force now in charging the officers with notice than it had before this law was enacted. . . . Under the law, the plaintiff, if she did not rely upon previous knowledge of the defect by the aldermen of the ward, must show that the defect in the walk had existed for three weeks, and she must also show such a state of facts as will charge the proper city officers with notice of the defect before the accident happens."

Under these decisions, it is apparent that, unless it can be said that the defect in question was of such a nature and of such long standing as to charge the city with notice, the court's instruction was improper, and the jury's finding will not support a judgment. Considering the nature of the defect, and its location with reference to the customary use of the street, we have already determined that the court could not say, as a matter of law, that it was such a defect as would make the city absolutely liable. That was a matter for the jury to find, under all the facts and circumstances in the case. Such being the fact, and actual notice not being relied upon, the question should have been so framed as to permit the jury to find whether the conditions were such as to bring constructive notice home to the city. This becomes all the more significant when we consider that the witnesses who testified that the hole had existed for several months before the accident did not describe its appearance or dimensions when first observed. It is a matter of common knowledge that a hole located as this was would be very likely to enlarge more or less during the rainy fall months.

Plaintiff's accident happened in November, 1891. Dr. Oviatt was permitted to testify that he performed an operation on plaintiff's leg in the summer of 1893, for which he

charged $100. The record contains no testimony showing any necessary or causal connection between the injury and the subsequent operation. Unless so connected, the evidence was improper.

One August Ebert testified that he was passing the place of the accident while the plaintiff was lying there, but that it was so dark that he could not recognize who was there. Subsequently he was recalled, and asked whether, in his judgment, the plaintiff was intoxicated. Against defendant's objection, he was permitted to answer that he saw no indications that the man was drunk. The testimony was clearly improper.

Other objections have been raised and discussed, but sufficient has been said to cover those that are deemed material.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ROBERTS, Appellant, vs. ROBERTS, Respondent.

May 16 — June 21, 1900.

Wills: Fraud by attorney in drawing: Costs.

1. In a contest over the probate of a will giving a large share of the testator's property to his son R. and disinheriting J., evidence that the testator declared on many occasions that R. should have no more of his property, and that the testator was not able to understand enough English to comprehend the will in question, is *held* insufficient to show that he was defrauded by an attorney who drew the will, and supposed he was disinheriting R. and providing for J.
2. Where the facts hardly allow belief in the good faith of the contestant of a will in appealing to the circuit court from the action of the county court in admitting the will to probate, it was not an abuse of discretion to award costs against the appellant.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Samuel Roberts, then aged seventy-two, went to one John S. Maxwell, an attorney practicing law at Columbus, who both before and after that time acted in that capacity for him, gave instructions for the drawing of his will, and a few days afterwards, viz. May 7, 1890, went again to the office, and executed the will here propounded. By that will he gave $1,750 to each of two daughters, $1,250 to another, and certain city real estate to the third and to a fourth. To his son *Richard S. Roberts* he gave his farm, valued at about $9,000, charged with the foregoing money legacies, and with the debts and expenses of administration, so far as the same might not be satisfied by personal property. Another son, *John S.*, was disinherited, for the reason (expressed in the will) that the testator had already given him such share of his estate as he desired him to have. The will is attacked on the usual grounds of mental incompetency, undue influence, and fraud in its execution. Both the county court, and the circuit court on appeal, found in favor of the will; and from the judgment of the latter, affirming its probate, *John S. Roberts* appeals.

For the appellant there was a brief by *Malone & Miller*, and oral argument by *J. E. Malone* and *B. W. Jones*.

J. H. Rogers, for the respondent.

Dodge, J. The record is barren of any evidence of mental incapacity. The testator is shown to have managed his own affairs up to a period much later than the making of the will. Indeed, his mental capacity is not seriously challenged. The record is equally barren of any direct evidence of the exertion of any influence over him by any of the beneficiaries of the will. All that is urged in support of such undue influence is a vague suggestion that *Richard S. Roberts* appeared to have a suspicious knowledge that there was a will, while he denied that he had any knowledge of its existence until after his father's death. The vigor of ar-

gument is cast upon a suggestion that the testator was defrauded by the attorney, Maxwell, and supposed that he was devising the bulk of his estate to the contestant, *John S.*, and disinheriting the proponent, *Richard S.* Of this there is no particle of evidence, except testimony of certain witnesses to the effect that they had heard the testator declare on many occasions that *Richard* should have no more of his property, and by the assertion that the testator was unable to understand enough English (he being a Welshman) to comprehend the will in question. Both of these circumstances are met by much evidence to the contrary, but, even if they stood undenied, without more to aid them we should be loath to say that thereby could a court be justified in believing in the perpetration of so gross and unprofessional a fraud by a member of the legal fraternity.

Error is assigned for that the court excluded from consideration the testimony of each of two of the daughters, heirs at law, as to statements made by their father to the other. It is perhaps not entirely clear from the record whether any of these statements were made so wholly without participation by the witness as to enable her to testify, under the rule suggested in *Goerke v. Goerke*, 80 Wis. 516, 520, and *Wollman v. Ruehle*, 104 Wis. 603; but we deem it unnecessary in the present case to decide upon the admissibility of that testimony, for, upon a careful examination of the record, which contains it all, we are convinced that the evidence falls far short of justifying a finding adverse to the will on any of the grounds of attack, but, on the contrary, that the findings of the circuit court are supported by the overwhelming preponderance of all the evidence, and that the judgment should not be disturbed.

No abuse of discretion was committed by the circuit court in awarding costs against the appellant. We should be slow to review the discretion in any event, but in this case the facts, so far as apparent, hardly allow belief in the good

faith of the appeal, save as appellant may have been rendered unduly suspicious by his very apparent disappointment.

By the Court.— Judgment affirmed.

107	216
107	263
108	265
107	216
110	[1]657
f110	[1]659
107	216
113	[1] 13
107	216
116	[1] 95

HELMKE, by guardian *ad litem*, Appellant, vs. THILMANY, Respondent.

May 16 — June 21, 1900.

Master and servant: Personal injury: Minors: Unguarded machinery: Assumption of risk: Court and jury.

1. While a sixteen year old boy, at the close of his first day's work in defendant's paper mill, was putting on his coat preparatory to quitting work, in an open space a few feet wide between unguarded gearing on a paper machine and closets in which clothing of employees was kept, he backed up against the gearing and the garment was drawn into it, and he was injured. In an action to recover therefor it appeared, among other things, that plaintiff had worked about other paper mills for two years; that he knew there was danger around the wheels, but did not at the time notice those which caused the injury, although he could have seen them had he been facing them; and that there were vacant spaces in the mill where he might have changed his clothes in safety. *Held*, that he assumed the risk as matter of law, even though he had not been warned concerning the danger. WINSLOW and DODGE, JJ., dissent.
2. In such a case the relation of master and servant continued to exist, although at the time of the injury plaintiff was changing his clothes preparatory to going home.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Wigman, Martin & Martin*, and oral argument by *P. H. Martin.*

For the respondent there was a brief by *Nash & Nash*, and oral argument by *L. J. Nash.*

CASSODAY, C. J. This action was commenced September 9, 1897, to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant as a cutter boy in his paper mill at Kaukauna, March 31, 1896, whereby his right hand and arm were caught and crushed between the revolving cogwheels, and so injured as to render amputation thereof necessary three inches below the elbow. The grounds upon which the plaintiff seeks a recovery are that such cogwheels were unguarded, and unnecessarily and unreasonably dangerous, and because of the plaintiff's youth, inexperience, and lack of judgment, and the defendant's failure to instruct, warn, or caution the plaintiff against such danger. The defendant answered, by way of admissions, denials, and counter allegations, to the effect that the injuries sustained by the plaintiff were in consequence of his own gross carelessness and negligence, and were not the result of any negligence on the part of the defendant. At the close of the testimony on the part of the plaintiff the court granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

The room in which the machinery was located was about one hundred feet long from east to west, and nearly thirty-six feet wide. The paper machines and appurtenances ran from near the westerly end of the room toward the east, a distance of about sixty feet, and were about nine feet wide, and the southerly side of such line of machinery was about sixteen feet from the south wall of the room, and constituted the front side of such machines, where several operators, including the plaintiff, were supposed to be when at work and the machines in operation. The machines were protected by being covered. There was no gearing nor cogwheel on that front side, and the plaintiff's work was to clean the machines and lay off the paper when it was running,— that is, pick it up and lay it on the pile when it came from the cutter. The north wall of the room was a

little over eleven feet north of the north side of the line of machinery mentioned. Opposite such machinery on the north side were four windows, each window four feet wide. Between such windows there was a space of about ten feet of wall, and against such wall were closets four and one half feet wide, and standing out from the wall nineteen inches, in which the workmen placed their garments or clothing. The closet so occupied by the plaintiff was opposite about the middle of such line of machinery. From the door of that closet when closed to the north side of such line of machinery was nine and one-half feet, and the same was open and free the whole distance, and was also open and free from the westerly end of such closet easterly for a distance of about seven and one-half feet. From the closet east along the north wall of the building there was an open space of about five and one-half feet wide for passage. Five feet south of the north wall of the room, immediately west of the plaintiff's closet, was the face of a large cogwheel, thirty-six inches in diameter, and from the center of which was a shaft running to the paper machine mentioned. A small cogwheel on the east end of a shaft matched into the large cogwheel on the west side thereof, and on the face towards the wall. The center of the small cogwheel, as well as the large cogwheel, was twenty-nine inches from the floor. At the time of the accident the plaintiff was caught between the cogs of the two wheels under circumstances hereinafter stated. Such is a brief description of the place of the accident.

At the time of the injury the plaintiff was sixteen years and six and one-half months of age. He testified to the effect that he quit school when he was twelve years of age; that he then piled headings in a dry house in Marathon county for one hundred days; that he then came back to Kaukauna, and went to work in Patten's paper mill, scraping screens in the pulp room; that he continued to

work in Patten's paper mill for about two years or a little over; that in scraping screens he had to reach down in the bottom of the hopper and rake the bottom of it; that he did not scrape screens right along all the time that he worked in Patten's paper mill; that a part of the time he was wheeling wood, and then cleaning the roll on the pulp machine, to get the pulp off the roll, and in doing so he had to work near the machine; that he did not know how long he so worked removing the pulp from the rolls; that while at Patten's mill he also wiped off the machine on the front side, and cleaned the floor when there was grease around; that in wiping off the machine on the front side he worked near the revolving cylinders or calenders, but there was no cogwheel on that side; that in cleaning up the grease on the floor he went on both sides of the machine,— the front and back sides of the machine; that on the back side he had to go among the gearing and wheels,— down under them,— upon his hands and knees, and wipe up the grease; that right on the side he had to reach down under the cogwheels, but he was very careful not to let his clothing get caught in the wheels, because he knew if it got caught there was danger of being crushed; that there were other boys about his age doing the same kind of work in the Patten paper mill; that whenever he got a chance he always went ahead, and worked himself up; that after a while he so worked himself up to the position of cutter boy in Patten's paper mill; that he worked as cutter boy in that mill for five weeks; that he put the paper off when it broke; that in doing so he had to get his hands near the calenders or rollers; that he pushed the paper into the rollers with his wrist, so that his fingers would not get caught; that the defendant's paper mill was about half a mile from Patten's paper mill.

Plaintiff further testified that his father worked in the defendant's mill, and procured the position of cutter boy for him in the defendant's paper mill; that he commenced

work in the defendant's mill at 7 o'clock on the morning of March 31, 1896, and relieved the night cutter boy, Reikel; that he hung his clothes in the closet mentioned, by direction of Reikel, before commencing work; that the machine tender, Nolan, directed him to sweep up behind the machine about 2 o'clock, but said nothing about being careful and not getting hurt; that he had already learned to be careful; that whenever he went near the machine he had it in mind to be as careful as he could, because he knew there was danger around those wheels; that if Nolan or any one else had told him to be careful around those wheels he would have told him to do something that he knew enough to do; that he went behind the machine three times during that day; that he hung his coat in the closet in the morning; that he got it at noon, and hung it in the closet again after coming back from dinner; that Reikel came to relieve him about half past 5 o'clock in the afternoon; that Reikel hung his clothes in the closet at the same time that the plaintiff got his from the closet; that he put his coat on right by the closet; that the others changed their clothing right by the closet; that the end of his coat must have caught between the two cogwheels mentioned; that in putting on his coat his face was towards the closet and his back towards the machine; that, if his face had been the other way, he would have seen the machine, which was in plain sight; that, if he had been facing the machine, he could have kept his coat away from the wheel, if he had seen the gearing at the time of putting his coat on; that if he had been facing the cogwheels while putting his coat on he could easily have prevented it from being caught in the wheels; that he did not face the cogwheels, because his coat was in the closet, and he did not know there was gearing behind him; that he had been there before during the day, but did not take notice of the gearing; that he did not remember whether he cleaned under that gearing that day;

that there was not very much dirt there; that when he commenced work that day he knew he was going into a paper mill with machinery in it, and that he ought to keep himself safe from the machinery; that he never thought that it was his duty to look around and see where the machinery was located so as to keep away from it; that he first put on his vest and then his coat, and that was why he did not turn around; that if he had taken his coat on his arm, and passed between the driers and the calenders south of the machinery, he would have had a wide open space in which to put it on; that there was paper in the space a few feet east of the closet, and he did not remember whether there was room enough to put on his coat there or not, but he could have gone around the end of the machine into the open space south of it, and be in a place of safety; that the space between the driers and the calenders was about five feet; that it did not occur to him that there was danger of getting his hands or his coat caught in the cogwheels; that when he put his coat on Nolan and Reikel were east of him,— that is, in the direction he would naturally go to get out from behind the machine; that it was just getting dusk, and the electric lights had not been turned on.

Such is the general outline of the evidence.

Undoubtedly, counsel for the plaintiff is correct in claiming that although the plaintiff had finished his day's work, and had just changed his clothes preparatory to going home, yet that the relation of master and servant still existed between him and the defendant. *Ewald v. C. & N. W. R. Co.* 70 Wis. 420; *McGregor v. Auld*, 83 Wis. 546.

Counsel for the plaintiff contend that the closet in which the plaintiff and others kept their clothing was in dangerous proximity to the cogwheels mentioned. They cite the statute requiring the owner or manager of any factory, workshop, or other place were labor is performed to keep "all belting, shafting, gearing, hoists, fly-wheels, elevators and

drums therein, *which are so located as to be dangerous to employees in the discharge of their duty*," securely "guarded or fenced." Sec. 1636*j*, Stats. 1898. There is no claim, nor ground for claiming, that such statute precludes the defense of contributory negligence, nor the assumption of risk. *Thompson v. Edward P. Allis Co.* 89 Wis. 523, 530. Similar statutes have been construed the same way. *Curry v. C. & N. W. R. Co.* 43 Wis. 665, 683; *Holum v. C., M. & St. P. R. Co.* 80 Wis. 299; *Dugan v. C., St. P., M. & O. R. Co.* 85 Wis. 614; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 387.

Counsel contend that plaintiff was not only subjected to the danger necessarily incident to the performance of his work, but was allowed to follow the negligent custom of other employees, and put his coat, etc., in the closet mentioned, without being warned or cautioned by the defendant as to the danger of getting his clothing in the gearing. Assuming, for the purposes of this case (but without so deciding), that the defendant was negligent in not having such gearing "securely guarded or fenced," as provided by the statute, the question recurs whether the trial court was justified in holding, as a matter of law, upon the undisputed evidence, that the plaintiff assumed the risk of the danger complained of. That is the question submitted by the respective counsel. In a case of personal injury decided herewith (*Renne v. U. S. L. Co.*, *post*, p. 305), and where the injured person was younger than the plaintiff in the case at bar, it was held that the trial court properly submitted the question of the assumption of the risk to the jury, and in doing so charged them to the effect that if it was a danger "known and comprehended by him, or was such an open or obvious danger as that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable and ordinary care, to have known and appreciated it, then the law" was "that the plaintiff as-

sumed the risk of such danger, and that he" could not recover. In that case we attempted to point out what was meant by knowing the danger,— comprehending the danger and appreciating the danger,— and cited numerous adjudications of this court bearing upon the subject, and applicable to the facts there presented.

Those cases seem to be fairly distinguishable from the case at bar. In this case there was no uncertainty; no shifting conditions; no ambiguity in the facts or circumstances or evidence. There was nothing obscure or complex in the situation. The two cogwheels were near the floor, and in plain sight. As indicated in the statement of facts, the plaintiff testified that he knew there was danger around those wheels; that, if Nolan or any one else had told him to be careful around those wheels, he would simply have told him what he already knew; that he had cleaned up around the gearing that day; that he saw the gearing when he was putting his coat on; that, if he had been facing the machine instead of the closet at the particular moment, the gearing would have been in plain sight, and he could have kept his coat out of the wheels. The danger of touching or allowing his clothes to touch the gearing was, seemingly, just as apparent as it would have been to walk into an open fire, or against a red-hot stove or furnace. His explanation is that he never noticed the gearing; that he never thought of it. He had five weeks' experience as a cutter boy in the Patten paper mill, near by, and in which he had worked at one thing and another for more than two years. But it is unnecessary to repeat the evidence, which is given quite fully in the statement.

Upon the facts thus stated, it seems to us that the case comes within the numerous adjudications of this court which bar a recovery. In the *Chopin Case*, particularly relied upon by counsel for the plaintiff, the boy was required to oil the interior journal of the machin ry while in motion. *Chopin*

v. Badger P. Co. 83 Wis. 192. Here the plaintiff, while putting his coat on, unnecessarily backed up against the gearing, which he admits he knew to be dangerous.

This court has repeatedly held that the true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger. *Luebke v. Berlin M. Works*, 88 Wis. 442; *Craven v. Smith*, 89 Wis. 126; *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113; *Herold v. Pfister*, 92 Wis. 417; *Klatt v. N. C. Foster L. Co.* 92 Wis. 622, 627; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615; *Larson v. Knapp, Stout & Co. Company*, 98 Wis. 178. It has also been repeatedly held that where it appears from the undisputed evidence that the defect or danger is open and obvious, and such as under the circumstances ought to have been known and comprehended by the plaintiff, then he will be held to have assumed the risk as a matter of law. *Id.* Such appears to be the case at bar, and hence the trial court correctly held that the plaintiff assumed the risk.

By the Court.—The judgment of the circuit court is affirmed.

WINSLOW, J. I am unable to agree with the proposition that, as matter of law, the plaintiff assumed the risk in this case, but think the question was a proper one for the jury. The plaintiff was a boy sixteen years of age, of limited experience. While putting on his coat, preparatory to quitting work, in a place provided for that purpose, the garment was drawn into the mesh of unprotected cogwheels. While he knew there was danger about unprotected cogwheels, and that he would be seriously hurt if drawn into them, I do not think that it can be said that he necessarily knew or ought to have known the danger that his coat

might be drawn or sucked into the mesh of the cogwheels. This question, in my judgment, was for the jury.

DODGE, J. I concur in the foregoing opinion of Mr. Justice WINSLOW.

STANLEY, Appellant, vs. BOUCK and another, interpleaded, Respondents.

May 17 — June 21, 1900.

Setoffs: Assignment of claim to attorney: Priority: Notice: Commencement of action: Estoppel in pais.

1. In January, 1892, in proceedings to assess damages for a wrongful attachment, a judgment in favor of the defendants for their disbursements only, with costs, was rendered on a special verdict, which, on February 5, 1895, was held erroneous by the supreme court and a judgment ordered for full damages. On February 17, 1895, defendants assigned the judgment already rendered in their favor, and any judgment to be entered, to their attorneys as security for their fees and disbursements in the attachment action. On March 22, 1895, the plaintiff in the attachment action commenced an action to offset the judgment in that suit against a judgment in his favor for deficiency on mortgage foreclosure, obtained March 1, 1892; and two days later said attorneys notified him of the assignment to them. On January 29, 1897, judgment was formally entered in the attachment action as directed. *Held*, that said assignment gave the attorneys a valid lien on the claim for damages, which attached to the judgment as soon as entered and was superior to plaintiff's right of setoff.
2. The commencement of the action to obtain the setoff in such case, before notice of the assignment, was not such a change of position as raises an estoppel *in pais*.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action in equity, brought to offset a judgment obtained by the defendants Carey against the plaintiff, *Stan-*

ley, against another judgment obtained by *Stanley* against the defendants Carey. The facts are not materially in dispute.

On the 14th of February, 1889, the plaintiff commenced an attachment suit for an instalment of interest not yet due upon a note of $24,281, which had been previously given by the Careys to *Stanley*. In this action the sheriff seized a large quantity of cranberries and cranberry boxes and other personal property upon his writ of attachment, and the same were totally destroyed by fire a few days after the seizure, with no insurance. The affidavit of attachment was traversed by the Careys, and trial had of the traverse, and the traverse sustained. Thereafter the damages of the defendants were assessed, and a special verdict rendered upon such assessment, finding the value of the property destroyed, and the amount incurred by the defendants for attorney's fees in obtaining dissolution of the attachment. The circuit court refused judgment for the value of the property destroyed, but gave the Careys judgment against the plaintiff for the amount of attorney's fees incurred. An appeal having been taken from this judgment by the Careys, that part of the judgment refusing to allow the Careys judgment for the value of the property destroyed was reversed by this court February 5, 1895. 89 Wis. 410. Judgment was entered upon the *remittitur* January 29, 1897, for $6,603.77. During all this litigation the defendants *Bouck* and *Wood* were attorneys for the Careys, and it is found by the court that their services and disbursements therein amounted to $3,406, which has never been paid.

On the 15th of April, 1890, *Stanley* commenced a foreclosure action in the United States court, based upon the same note before mentioned, and a real-estate mortgage accompanying the same, given by the Careys. In this action judgment of foreclosure was rendered December 4, 1890, and thereafter the mortgaged real estate was sold, and on the

1st day of March, 1892, judgment for deficiency was rendered against the Careys for $10,154.70. The Careys then were, and ever since have been, insolvent. In 1890 the Careys brought three actions against certain insurance companies upon insurance policies covering the attached property, and recovered judgments in said action in January, 1892, which judgments were, however, reversed in this court. 84 Wis. 80; 84 Wis. 208. In these actions *Bouck* and *Wood* were attorneys for the Careys and their services therein were worth $1,250, which has never been paid. February 7, 1895, the Careys assigned the judgment already rendered, and any judgment to be thereafter rendered, in the attachment action, to *Bouck* and *Wood* as collateral security for the payment of their services and disbursements in that action and in the other actions aforesaid. March 12, 1895, the Careys assigned the judgment for costs in this court absolutely to *Bouck* and *Wood.*

This action was commenced by service of summons March 23, 1895, and notice of the assignments above named was given by *Bouck* and *Wood* to the plaintiff March 25, 1895. In August, 1898, *Bouck* and *Wood* were made parties defendant in this action on their own motion, and have thereupon answered, claiming priority for their liens over any setoff in favor of the plaintiff. This issue was tried by the court, and findings made in accordance with the facts as above stated, and *Bouck* and *Wood* were adjudged to have a lien on the attachment judgment, superior to the plaintiff's right of setoff, for $4,306 for services and disbursements in the attachment suit, and for $1,250 for services in the insurance actions; and it was further adjudged that they were entitled to collect said amounts by execution against *Stanley. Bouck* and *Wood* afterwards remitted the sum of $1,250 from the judgment. The plaintiff, *Stanley*, appeals.

For the appellant there was a brief by *Perry Niskern*, attorney, and *Pence, Carpenter & High*, of counsel, and oral

argument by *A. M. Pence.* They contended, *inter alia*, that no lien for attorney's fees attaches before judgment, and such lien or an assignment of the judgment, to be enforced, must exist before the right of setoff accrues to the judgment debtor, and notice must be given to such debtor of the lien or assignment and of the intention of the attorney or assignee to assert the same before the debtor asserts his setoff. *Courtney v. McGavock*, 23 Wis. 619; *Rice v. Garnhart*, 35 Wis. 282; *Voell v. Kelley*, 64 Wis. 504; *Kusterer v. Beaver Dam*, 56 Wis. 471; *Marshall v. Meech*, 51 N. Y. 140; *Gauche v. Milbrath*, 105 Wis. 355; Jones, Liens, §§ 217, 223, 234; 2 Am. & Eng. Ency. of Law (2d ed.), 1077, 1080; 1 Am. & Eng. Ency. of Law (1st ed.), 840; *Weed S. M. Co. v. Boutelle*, 56 Vt. 570; 13 Ency. of Pl. & Pr. 140. The statute confers upon the appellant a right to set off the judgment in his favor against the judgment or judgments in favor of the Careys. Such statute also confers a priority over any claim of the attorneys procuring either judgment and over any assignment of such judgment, and especially in this case as appellant's right to a setoff is prior in point of time to the claim or claims of the respondents as attorneys or assignees, and no notice was served upon appellant of such lien or assignment and of the intention of such attorneys or assignees to assert or insist upon the same prior to the time when he asserted his right of setoff. Stats. 1898, secs. 2606, 4258; *Puett v. Beard*, 86 Ind. 176; *Simpson v. Hart*, 14 Johns. 63; *Temple v. Scott*, 3 Minn. 419; *Nicoll v. Nicoll*, 16 Wend. 445, and note; *People ex rel. Manning v. Common Pleas*, 13 Wend. 649; *Martin v. Hawks*, 15 Johns. 405; *Fairbanks v. Devereaux*, 58 Vt. 359; *Johnston v. Humphrey*, 91 Wis. 76; *Martin v. Kanouse*, 17 How. Pr. 146; *De Figaniere v. Young*, 2 Rob. 670. The setoff in question is a setoff under the statute, and does not depend upon equitable principles which existed prior to the passage of the statute. Subd. 1–4, sec. 4258, Stats. 1898.

Gabe Bouck and *John J. Wood, Jr.*, respondents, argued, among other things, that a judgment may in equity be set off against a judgment, but not against a demand not reduced to judgment. 3 Wait, Pr. 195; *Falconer v. Stinson*, 44 W. Va. 547; *Nuzum v. Morris*, 25 W. Va. 559; Waterman, Setoff, § 347; 22 Am. & Eng. Ency. of Law, 449; *Duncan v. Bloomstock*, 13 Am. Dec. 729; *Thorp v. Wegefarth*, 93 Am. Dec. 789; *Hudson v. Kline*, 9 Grat. 379; *McClellan v. Kinnaird*, 6 Grat. 352; *Mackey v. Mackey*, 43 Barb. 58.

WINSLOW, J. The essential facts in the case are few and simple. *Stanley* wrongfully attached the property of the Careys September 14, 1889. The assessment of damages therefor was had in September, 1891, and a special verdict rendered, on which (as afterwards held by this court in *Stanley v. Carey*, 89 Wis. 410) the Careys were entitled to judgment for about $6,000, but were given judgment January 20, 1892, for only $800 and costs. March 1, 1892, *Stanley* obtained judgment against the Careys for deficiency upon mortgage foreclosure for over $10,000. February 5, 1895, that part of the judgment in the attachment refusing full damages was reversed by this court, and judgment directed for the Careys against *Stanley* for full damages. February 7, 1895, the Careys assigned the judgment already rendered in the attachment suit, and any judgment to be thereafter entered, to *Bouck* and *Wood*, their attorneys, as collateral security for their fees and disbursements in that action and in their other litigation. March 12, 1895, the Careys assigned the judgment for costs in this court in the attachment suit absolutely to *Bouck* and *Wood*. March 23, 1895, *Stanley* commenced this action to offset the damages in the attachment suit against the deficiency judgment. March 25, 1895, *Bouck* and *Wood* gave notice to *Stanley* of their assignments. January 29, 1897, judgment was for-

mally entered in the attachment suit for $6,603.77, in favor of the Careys against *Stanley*. The Careys were insolvent March 1, 1892, and have remained so ever since.

Upon these facts the plaintiff's claim is that he is entitled to set off the damages in the attachment suit against his judgment for deficiency because his deficiency judgment antedated the damage judgment, and because he commenced this action before any notice was given by *Bouck* and *Wood* of their assignment.

The legal principles applicable to the equitable lien of attorneys upon a cause of action or judgment are quite well settled in this court. When the action is founded upon a written instrument in the possession of the attorney, he has a lien on the *cause of action* for his services and disbursements at least from the time of the commencement of the action (*Courtney v. McGavock*, 23 Wis. 619; *Howard v. Osceola*, 22 Wis. 453; *Rice v. Garnhart*, 35 Wis. 282), and after judgment he has a lien on the judgment obtained. When the action is not founded on any such instrument, but is brought to recover unliquidated damages, either in contract or tort, there was, at common law, no lien before judgment. If such cause of action was assignable, a lien might be created thereon by agreement between attorney and client, but, if not assignable, no such lien could be created. *Kusterer v. Beaver Dam*, 56 Wis. 471. By a statute passed since that decision, however, such a lien may now be given by contract between the attorney and his client. Ch. 204, Laws of 1891 (now sec. 2591*a*, Stats. 1898). But when judgment has been recovered in an action, whether in contract or tort, the rule is well established that the attorney has an equitable lien thereon, by operation of law, for his services and disbursements in that action. *Rice v. Garnhart, supra; Marshall v. Meech*, 51 N. Y. 140; *Gauche v. Milbrath*, 105 Wis. 355. As between attorney and client, this equitable lien or right to be paid out of the judgment obtained by the attorney's ef-

forts, whether resting upon agreement or raised by operation of law, is complete without notice to the opposite party. This is elementary.

Where, however, the action is not founded upon a written instrument in the attorney's possession, notice must be given, by the attorney claiming the lien, to the opposite party, in order to preserve his right to a lien against a settlement of the cause of action or judgment, made in good faith. This is simply an application of well-known rules of estoppel. The opposite party in such case has changed his position in reliance upon an apparent state of facts, and in ignorance of the attorney's claim, and will be protected. *Courtney v. McGavock, supra.* No such principle, however, can in reason apply to a mere claim of equitable setoff, because there has been, in such case, no expenditure nor change of position by the party claiming the setoff. The mere commencement of an action is not such a change of position as raises an estoppel *in pais. Frei v. McMurdo*, 101 Wis. 423.

In the present case the claim of the Careys for damages resulting from the destruction of the property wrongfully attached was a claim which survived under sec. 4253, Stats. 1898, and hence, under well known principles, it was assignable at any time, either before or after judgment. Furthermore, the plaintiff's deficiency judgment could not be pleaded as a counterclaim thereto. Hence when it was assigned before judgment to *Bouck* and *Wood* as collateral security for their services and disbursements in the same case, it is plain that the assignment gave them a valid lien, and that there was no existing setoff. How such lien could be defeated by a setoff afterwards coming into existence we cannot perceive. As soon as judgment was entered, the lien theretofore existing on the cause of action attached to the judgment itself. There was no interval of time in which the right of setoff could first attach and defeat the lien. Had there been a *bona fide* settlement made before notice of

the assignment and lien was given to the plaintiff, the principle of *Courtney v. McGavock* would apply, but there was none. An application to the court to set off one judgment against another is addressed to the sound discretion of a court of equity, whether made by motion or action, and when the judgments are rendered in actions having no connection with each other, it will not be allowed as against an attorney's equitable lien for services and disbursements, where evident injustice will be done. *Gauche v. Milbrath, supra.*

By the Court.— Judgment affirmed.

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THE MCCALL COMPANY, Respondent, vs. ICKS and another, Appellants.

SAME, Appellant, vs. SAME, Respondents.

May 17 — June 21, 1900.

Contracts: Sales: Offer: Mutuality: Consideration: Uncertainty: Measure of damages: Evidence: Interest.

1. An offer to purchase goods expressly stated that on its acceptance it should constitute a contract binding between the parties for a certain term. It was signed by the purchaser and such signature was followed by a stipulation to save the purchaser harmless, on certain conditions, from loss through handling the goods. It also contained an acknowledgment of a payment on the contract, and the seller signed by its duly authorized agent. *Held*, that the transaction between the parties constituted a binding contract, and was not void for want of mutuality or consideration.
2. A contract, whereby defendants agreed to take monthly as produced and placed on the market by plaintiff, for the period of two years, one of each size of certain fashion patterns, and the plaintiff therein agreed to furnish such goods, is not void for uncertainty.
3. Where damages are claimed for breach of contract to purchase fashion patterns as produced and placed on the market, and the full contract period has run, and hence the exact number of patterns called for susceptible of proof, recovery cannot be had based on evidence, taken long before the expiration of the contract period,

as to the probable number of patterns that plaintiff would produce each month for the balance of such period: the proofs should be confined to patterns shown to have been actually produced.

4. In an action on a contract, breached by failure to accept and pay for goods contracted for, interest may be allowed, not as interest strictly so called, but as part of plaintiff's damages, and as necessary to give complete indemnity for the breach of the contract.

APPEALS from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed on plaintiff's appeal; affirmed on that of defendants.*

Action to recover damages for breach of contract. November 1, 1896, the defendants made to plaintiff the following proposition in writing:

"THE MCCALL COMPANY,

"144–146 West 14th St., New York:

"Please deliver to the Nickel Plate, c/o Chic. & Northwestern Train No. 57, freight, at New York, addressed to us, a stock of the McCall bazaar patterns, at the uniform price of 7½ cents for each pattern (excepting those retailed for 10 cents, the price of which is 5 cents each), amounting to $75.00 net, payable ten days after shipment, including Dec. issue.

"Also ship us each month of the new monthly patterns, one of each size of each style, at the same prices as above, commencing with Jan. issue; also fashion sheets monthly, and other publications, etc., in quantities and at prices specified below.

"Monthly shipments to be sent per as above freight.

[Then follows a schedule showing quantities and prices.]

"Change of advertisement on back page twice each year (including the first advertisement) free of charge. If other changes are desired, not over $5.00 will be charged for composition and plate on each change.

"We will reorder, at the prices above named, once each week, or oftener, all patterns sold, thus keeping a stock of patterns on hand as above specified.

"All goods ordered for delivery after the first stock are

to be paid for on or before the 5th day of the month succeeding date of shipment; if not then paid, subject to sight draft. All prices quoted are net.

"We will not sell any other patterns than the McCall bazaar patterns received from you during the term of this contract order, nor transfer this agency from No. 106 Wisconsin Ave., without your written consent, and will pay all transportation charges from your New York office.

"Any patterns received from you under this contract order, that are reported discarded by you twice each year — January and July — during the term of this contract, can be returned by us at sixty-five per cent. cost price in exchange for other patterns at cost price, provided such patterns have been received by you and others ordered by us in exchange within sixty days from date of discard report.

"The terms of this contract are to remain in force for two years from date, and thereafter until the expiration of sixty days' notice given by either party in writing.

"All terms are in printed or written form.

"Signed in duplicate after being read.

"Purchaser's name, ICKS & GRUENHECK.

"Address, Neenah.

"State, Wis.

"At the end of two years (if you so desire) take an invoice of your stock of patterns on hand, and if the result of the business shows a loss in the sale of patterns — that is, if you have paid us more money for patterns than you have received at retail prices — we will, in thirty days after receipt of the patterns, pay you such loss in cash, providing all the terms of this contract have been fully complied with.

"Received on account of above contract order one dollar, to be applied on first bill of goods.

"Dated November 1, 1896.

"THE MCCALL COMPANY

"(Incorporated State of New York),

"Per FRANK S. PIERSON."

The contract thus made between the parties was carried out until the month of July, 1897, at which time defendants refused to take any more goods under it, or to recognize it as binding upon them. The court found facts as aforesaid, and that plaintiff was damaged by reason of the defendants' violation of the contract in regard to taking and paying for the fashion sheets, in the sum of $102.75, but that no damage could be recovered for the failure to take patterns, because the contract in that regard was void for uncertainty. Judgment was accordingly entered in plaintiff's favor and for its costs and disbursements in the action. Both parties appealed.

For the plaintiff there was a brief by *Charles M. Morris*, attorney, and *Adolph Huebschmann*, of counsel, and oral argument by *Mr. Morris*.

Silas Bullard, for the defendants.

MARSHALL, J. The defendants' appeal is mainly on the ground that the transactions between the parties did not constitute a binding contract for want of mutuality and consideration to support the promise of the defendants, the theory being that plaintiff did not accept defendants' order. On that it is considered that the trial court reached the right conclusion. The order expressly stated that upon its acceptance it was to constitute a contract, binding between the parties for two years from its date, and thereafter until the expiration of sixty days' notice given by either party in writing. It was first signed by the defendants as the parties to be bound as purchasers. Following their signatures is language to the effect that upon certain specified conditions the vendors will save the purchasers harmless from loss by reason of handling the bazaar patterns. That is followed by language acknowledging receipt of one dollar upon the contract, to be applied on the first bill of goods, and then follows the signature of the plaintiff by its duly authorized

agent. The offer to purchase goods, the agreement to save the purchasers harmless from loss on the patterns, and the receipt of one dollar on the contract, are all parts of one entire written agreement. The receipt of one dollar and the agreement to save the purchasers harmless from loss in handling the patterns are inconsistent, as it seems, with any other reasonable theory than that, when the plaintiff signed the paper, it did so for the purpose of making a binding contract between it and the defendants in accordance with the terms of the paper, and that both parties must have so understood it.

The claim that there was no consideration for the obligation of the defendants is manifestly untenable. When plaintiff accepted the contract order, it became bound to comply with all its conditions and provisions. Its promise in that regard, which must be implied from the acceptance, was ample consideration for the obligation incurred by defendants. *Shadbolt & B. I. Co. v. Topliff*, 85 Wis. 513.

Some question is raised as to the correctness of the finding of the court in regard to the loss suffered by plaintiff on account of defendants' refusal to receive and pay for the fashion sheets. It is contended that the finding is excessive to the extent of $7.80, and that the error was committed by reason of the court's taking $3.15 as the cost to plaintiff of each set of fashion sheets, instead of $3.67, which the evidence shows was the average cost to plaintiff, taking into consideration the entire product of their business for the year. There was evidence tending to show that the production of the additional fashion sheets that would have been required to satisfy the breached contract, had the defendants complied with its provisions, would not have exceeded the sum taken by the court as a basis for determining plaintiff's damages. It seems obvious that, the entire expense of preparing the fashion sheets having been incurred, the cost of producing a few additional sheets would

have been considerably less than the average cost of the entire product of the business for the year, and that the difference was legitimately a part of plaintiff's loss. We cannot disturb the finding of the court on that branch of the case.

What has been said disposes of defendants' appeal. On the plaintiff's appeal we are required to determine whether the trial court rightly decided that the agreement, whereby the defendants offered to take monthly, as produced and placed on the market by plaintiff, for the period of two years, one of each size of each style of the McCall bazaar patterns, and plaintiff agreed to furnish such goods, was void for uncertainty.

Where the fatal uncertainty lies, which the trial court discovered, we are unable to see. Courts are to construe contracts so as to sustain rather than to defeat them, if that can reasonably be done. Certainty, not uncertainty, is to be sought for. It is only after applying all the tests which the rules of law and of reason will permit, to a contract, and a failure thereby to discover, reasonably, what the parties agreed to, that the court should say it is too uncertain to be enforced. *Redman v. Hartford F. Ins. Co.* 47 Wis. 89; *Walsh v. Myers*, 92 Wis. 397; *Torrence v. Shedd*, 156 Ill. 194; *Thrall v. Newell*, 19 Vt. 202.

It was no necessary part of the agreement in question, in order to make it binding, that plaintiff should expressly agree to produce bazaar patterns, or such patterns in any particular quantity. It was perfectly competent for plaintiff to agree to furnish to defendants one set of each style of such patterns as it should produce for sale, and for defendants to agree to take and pay for the same. That made a perfectly certain contract as to what the parties agreed to do; time would necessarily render certain the number of patterns to be furnished, received, and paid for. If plaintiff had failed to produce any bazaar patterns, the agreement on

the part of the defendants would not have been breached, because their obligation was conditioned upon the production and furnishing of such patterns. The condition being satisfied, the agreement of the defendants to take one set of each style of the patterns immediately became legally binding upon them. Mere indefiniteness as to the amount of material or goods which may be delivered under a contract, or uncertainty even as to whether any will be delivered, is not necessarily a fatal uncertainty. It is sufficient that there be a distinct agreement, supported by a sufficient consideration, to take such quantity as may be delivered and to pay for the same at a price named in or ascertainable by such agreement. Many illustrations of this can be found in the books.

In *Minnesota L. Co. v. Whitebreast C. Co.* 160 Ill. 85, the contract was to the effect that the lumber company would buy such anthracite coal of the coal company as it should need in its business for the season of 1886–87 at a stated price, and the coal company would furnish such coal when ordered. The point was made that the contract was void for uncertainty, because the lumber company was not absolutely bound to take a specific quantity of coal. It was held that, looking at the situation of the parties when the contract was made, and construing it in that light, the plain intent of the parties was that the lumber company would continue its business as usual and take of the coal company such anthracite coal as might be required in such business for the period named in the agreement; that it was not essential to the binding force of the agreement that it should be certain as to the precise amount of coal the lumber company would require; that it was sufficient that it was bound to take its supply of coal from the coal company. The court remarked that such contracts are very common, and always regarded as binding.

In *Smith v. Morse*, 20 La. Ann. 220, a contract to take all

the ice required for a certain hotel for five years was held sufficient, as the parties must have contemplated that the hotel would be continued and that it would necessarily require ice during the whole of such period; and that it was not essential to the validity of a contract that it should be certain in advance as to the actual amount of ice that would be required.

National F. Co. v. Keystone Mfg. Co. 110 Ill. 427, involved the validity of an agreement on the part of the defendant to take its supply of iron for the season of the plaintiff, and on the part of the plaintiff to furnish such iron from time to time as ordered and at certain stipulated prices. The contract was held sufficient as to mutuality and certainty, because the vendee could not, without clearly violating it, take any part of its supply of iron from any other party than the vendor, and the lapse of time would necessarily render certain the quantity of iron the contract called for.

Many more like cases might be cited, all to the effect that a contract is not void for uncertainty if it can be made reasonably certain by reference to its subject matter, or to what was fairly within the contemplation of the parties when it was made. Here the plaintiff was an established concern, carrying on the business, among others, of producing patterns called the McCall bazaar patterns. In the very nature of things, the parties to the transaction assumed that the plaintiff's business would continue to run as usual, and that it would, from month to month, produce and offer to its customers patterns of the kind specified in the contract. The number of such patterns was necessarily left to be made certain by the operation of plaintiff's business. That was a matter as plainly within the contemplation of the parties as anything expressly stipulated in the contract, and was as much a part of the contract as if expressly stipulated therein.

The foregoing disposes of the only possible theory that can be advanced to sustain the proposition that the agree-

ment to take the bazaar patterns was void for uncertainty, and leaves only to be considered the amount of damages which plaintiff is entitled to recover on that branch of the case.

Evidence taken long prior to the expiration of the contract period of two years, as to the probable amount of patterns that plaintiff would produce each month for the balance of such period, as a basis for determining the measure of plaintiff's damages, was admitted against defendants' objections. At the time of the trial the full contract period had run, and the case on the part of the plaintiff was susceptible of certain proof as to the exact number of patterns which defendants ought to have taken and paid for. That evidence was not offered. It is considered that the objection by the defendants to the evidence, as to the probabilities of the future operation of plaintiff's business, should have been sustained. The elementary rule that the best evidence must be produced that the nature of the case is susceptible of, seems to have been clearly violated. Parties are not permitted to establish primary facts by mere inference from other facts, when direct evidence of the former is in existence easily within reach, and there is no excuse whatever for a failure to produce it. This is not a case where prospective profits were required, necessarily, to be assessed under the difficulties attending the determination of such a question where the business in which the loss occurred was not in fact carried on, as in *Treat v. Hiles*, 81 Wis. 280; *Schumaker v. Heinemann*, 99 Wis. 251, and similar cases. There the only evidence the nature of the case was susceptible of, was as to what was done in the business when it was operated, as tending reasonably to show what would have been done thereafter had the business continued as the contract contemplated. On that ground alone, and because, under the circumstances, such evidence furnished a legitimate basis for the exercise of judgment and for calculation,

and was outside of mere conjecture and guesswork, it was held proper. It will readily be seen that the primary circumstance authorizing such evidence was displaced here by the lapse of time, rendering the exact facts as to the amount of plaintiff's production of patterns a matter of easy and absolute proof.

It follows that the evidence will not warrant a recovery of damages for breach of the contract to take patterns, based on the evidence of prospective manufacture thereof. The recovery must be confined to such patterns as the proof shows were actually produced and would have been supplied to the defendants but for their refusal to receive them. That amount we determine from the testimony to be $111.12. Upon that sum interest should be allowed at the rate of six per cent. per annum from the time the loss accrued to the plaintiff, which, as near as can be reasonably ascertained, was July 1, 1898. The interest is allowed as part of plaintiff's damages, and is necessary to give complete indemnity for the breach of the contract. It is not allowed as interest, strictly so called. *J. I. Case Plow Works v. Niles & Scott Co.*, *ante*, p. 9.

By the Court.—The judgment is affirmed on defendants' appeal and reversed on plaintiff's appeal, and the cause is remanded with directions to modify the judgment in accordance with this opinion.

MORGAN and another, Appellants, vs. MUELLER, imp., Respondent. 107 241 114 480

May 17—June 21, 1900.

Partition: Possession, when adverse: Abatement of action: Practice: Equity.

In an action for partition the only controversy was as to the existence of an executory contract whereby the plaintiffs, through their agent, agreed to convey the lands in question to the defendants,

under which contract defendants claimed to have gone into possession. *Held*, that the possession and claim of title by defendants were not hostile and adverse, but in subordination to plaintiffs' title, and such as could only be enforced in equity; and that the issues as to title, being equitable in their nature, might properly be disposed of in the partition action.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action for partition. The plaintiff *Morgan* is alleged to be the owner of one fourth, *Lloyd* one eighth, and defendants *Mueller* of five eighths, of the premises in suit. *Bouck* is made a defendant as holding a mortgage on the defendants' interest. The defendant *August Mueller* answered, setting up that on March 24, 1898, the lands in question were owned by the plaintiff *Lloyd* and seven other persons, each owning an undivided one eighth interest; that on said day one Scribner was the lawful agent of said owners, and authorized to sell said lands; that defendant made a contract with said agent to purchase said premises for $10,000,—$200 paid down, and the remainder to be paid when deeds were made,—and the defendant to have possession on April 1, 1898; that he has received a deed from five of the owners; that two of said owners conveyed their interest to the plaintiff *Morgan*, who took with notice of the defendants' right; that both plaintiffs refused to convey; that defendant took exclusive possession of the premises April 1, 1898, and holds the same adversely to plaintiffs. These facts were set up in abatement of the action, and the same facts were also set out at length as a counterclaim, and specific performance was demanded. The plaintiffs made reply to the counterclaim, denying that Scribner had any authority to sell, and alleging that *Morgan* was a purchaser in good faith, without any notice of the defendant's rights. When the case came on for trial the court took proof of the matters set up in abatement of the action, and made findings to the effect that

Scribner, who claimed to be the agent of the owners, sold the same to the defendant *August*, who went into possession under his agreement with Scribner, and had since had actual and exclusive possession adversely to the plaintiffs. And as conclusions of law the court found that plaintiffs could not maintain an action for partition, and directed a dismissal of the action without prejudice. A judgment of dismissal was entered, from which the plaintiffs bring this appeal.

For the appellants there were briefs by *W. W. Quatermass* and *Eaton & Weed*, and oral argument by *H. I. Weed.*

For the respondent there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck.*

BARDEEN, J. The action of the court below seems to have been based upon the idea that defendant's possession was exclusive and adverse to plaintiffs, and that the rights of the parties could not be determined in an action for partition, under *Deery v. McClintock*, 31 Wis. 195, and other cases in this court. The view we have taken of the case renders it unnecessary to consider or determine whether, the same matter having been set up both in abatement and as a counterclaim, the former is deemed to be waived, as suggested in *Hooker v. Greene*, 50 Wis. 271.

An inspection of the pleadings shows that there is absolutely no controversy as to the legal title of this land. Neither does the proof disclose any such adverse occupancy as to come within the rule of the cases in partition that decline to consider such controversies. Referring now to the question of title, the complaint shows that *Morgan* is the owner of an undivided one fourth, and *Lloyd* an undivided one eighth, interest in the land. The answer admits this title, but alleges that the defendant *Mueller* has a contract, through their lawful agent, for a conveyance of their interest to him. The only controversy is as to the existence of this contract. Under his alleged contract the defendant

went into possession of the land. Such possession was not hostile or adverse to the plaintiffs. By his own admission, it was in direct subordination to their title. His contract was executory. While executory his possession was that of his vendor, and he could not set up adverse occupancy. *Furlong v. Garrett*, 44 Wis. 111; *Simpson v. Sneclode*, 83 Wis. 201; *Whitcomb v. Provost*, 102 Wis. 278. The proof also shows that his claim was in subordination to, and not adverse to, the plaintiffs' title. His rights, if any, were such that he could only obtain relief in equity. His remedy was to obtain a specific performance of his contract. His counterclaim properly set up his grounds for relief. The controlling reason why controversies over the legal title to land will not be tried in partition suits is that such controversies are more properly cognizable in courts of law. But no such reason exists in this case. The defendant simply says that plaintiffs are not entitled to partition, because they have agreed to convey their title to him. This is denied. No good reason is perceived why the whole controversy may not be disposed of in this action. If the contract alleged was legally made, the defendant may secure specific performance, and the right to partition will be denied. If the defendant fails to make a case, the plaintiffs are entitled to a partition of the premises. This is because defendant's possession as a cotenant is not hostile to plaintiffs, and their alleged possession under the contract is in subordination to the title under which they claim, and is in reality the possession of their vendors. All of the cases agree that, if the issues of title claimed and asserted are equitable in their nature, they may be disposed of in the partition suit. See *Deery v. McClintock*, 31 Wis. 195; *Morse v. Stockman*, 65 Wis. 36.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

ROBERTS, Respondent, vs. MOODY and another, Appellants.

May 17 — June 21, 1900.

Fraud: Equity: Trust funds: Remedy at law: Judgments: Res adjudicata.

1. Defendants having received $2,500 and R. $1,200 as the result of a conspiracy whereby C. was induced to sell his farm for less than its value, a suit was brought to rescind such sale and recover back the property. In such suit the court found the fraud and conspiracy, but, because the land was held by an innocent purchaser, refused the equitable relief of rescission, and rendered judgment against defendants and R. jointly as upon a cause of action in tort for money obtained by fraud. Defendants invested their $2,500 in the purchase of a homestead. The judgment creditors, having collected $1,200 from R., released the judgment as to him — reserving, except as to such sum, all their rights thereon against the other judgment debtors,— and assigned the judgment to plaintiff, a brother of R., under circumstances indicating that the transfer was for R.'s benefit. *Held* that, each judgment debtor being liable for the whole judgment without right to compel contribution, plaintiff could not follow the money received by defendants and impose a constructive trust upon the homestead purchased therewith, until he had exhausted his remedy by execution or shown futility of any effort to do so.
2. In an action to rescind a sale on the ground of fraud, the court found the fraud, but refused the equitable relief of rescission because the property had been conveyed to an innocent purchaser, and adjudged a mere personal money judgment as upon a cause of action in tort for money obtained by fraud. Afterwards an assignee of such judgment brought the present action against defendants to charge their homestead, purchased with the fruits of the fraud, with a trust in his favor to an amount sufficient to satisfy the judgment. *Held*, that the same cause of action was presented as was presented in the former suit in equity, where the court decided just what the remedy should be and impliedly adjudicated against all other remedies, and that therefore the present action could not be maintained, it being *res adjudicata* that the plaintiff was not entitled to the relief demanded.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

In 1892 one Ira S. B. Cole was fraudulently induced by

the two defendants, *Betsey C. Moody*, his daughter, and *Cassius M. Moody*, her husband, in conspiracy with R. W. Roberts, to sell his farm, of the value of $4,800, for $3,000 received by him, and $1,200 received by Roberts. From the $3,000 he paid $2,000 to his daughter, the defendant *Betsey*, and $500 to the defendant *Cassius M.*, in consideration of their agreement to support him. After the death of Ira S. B. Cole, suit in equity was brought by three of his heirs at law, seeking to rescind such sale and recover back the property. In that case (reported in 96 Wis. 559) the court found the fraud and conspiracy, but held that the purchaser, Getzinger, was an innocent party, and therefore ordered judgment for damages in favor of the three plaintiff heirs of Ira S. B. Cole, to wit, Ira B. Cole, Sabra J. Keyser, and Charlotte Lossee, for each one fifth of the value of the land, to wit, the sum of about $2,800 damages and $700 costs. Thereafter the judgment plaintiffs collected from R. W. Roberts $1,200, and released the judgment as to him,—reserving, except for said $1,200, all their rights thereon against all the other defendants,—and shortly afterwards assigned the judgment to the plaintiff, *A. C. Roberts*, a brother of said R. W., and under circumstances tending to indicate that such transfer was in fact for the benefit of R. W. Roberts. Meanwhile defendants had invested their $2,500 in the purchase of a homestead, for which they paid $4,000. The present action is brought by *A. C. Roberts*, as assignee of said judgment, to charge said homestead with a trust in his favor to an amount sufficient to satisfy the balance of his judgment, to wit, about $2,300. It appeared that the defendants were insolvent, except for said homestead, but that R. W. Roberts is a man of considerable means. The judgment grants the prayer of the complaint, declares the title of the defendants to their homestead to be held in trust to the extent of the $2,300 aforesaid, and charges the same upon it as a lien. Defendants appeal.

For the appellants there was a brief by *Bouck & Hilton*,

and oral argument by *Gabe Bouck.* They contended, *inter alia*, that where a party has one or more remedies for the same wrong, electing one and pursuing it to judgment is a bar to any other remedy. 2 Herman, Estoppel, §§ 1022, 1039, 1040, 1051; *Barker v. Barker*, 14 Wis. 142; *Warren v. Landry*, 74 Wis. 151; *Cook v. First Nat. Bank*, 83 Wis. 31; *Hildebrand v. Tarbell*, 97 Wis. 446; *Carroll v. Fethers*, 102 Wis. 436; *Smith v. Milwaukee*, 18 Wis. 69; *Kaehler v. Dobberpuhl*, 60 Wis. 261; *Terry v. Munger*, 121 N. Y. 161; *Fowler v. Bowery S. Bank*, 113 N. Y. 450; *Conrow v. Little*, 115 N. Y. 387; *Crossman v. Universal Rubber Co.* 127 N. Y. 34; *Morris v. Rexford*, 18 N. Y. 552; *Sanger v. Wood*, 3 Johns. Ch. 416; *Terry v. Buek*, 40 App. Div. 419; *Dennett v. Codman*, 168 Mass. 428; *Bedier v. Fuller*, 106 Mich. 347; *Shoe v. Ziegler*, 159 Pa. St. 461; *Cranson v. Smith*, 47 Mich. 647; *Finn v. Peck*, 47 Mich. 208; *Neild v. Burton*, 49 Mich. 58; *Farewell v. Myers*, 64 Mich. 234; *Equitable L. A. Soc. v. May*, 82 Ga. 646; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Riehl v. Evansville F. Asso.* 104 Ind. 70; 1 Beach, Trusts, §§ 158, 231; *Oliver v. Piatt*, 3 How. 332.

For the respondent there was a brief by *Goodrick & Goodrick*, and oral argument by *E. J. Goodrick.* They contended, *inter alia*, that the money in the hands of the defendants was impressed with a trust so long as it could be traced as a distinct fund, and might be followed into the property purchased by defendants, and such property be charged with such trust to the extent of the trust moneys used in its purchase. 2 Pomeroy, Eq. Jur. §§ 1047, 1053, 1058; Perry, Trusts, §§ 128, 166, 835–837, 842; Beach, Mod. Jur. Eq. § 229; 10 Am. & Eng. Ency. of Law, 36, 39, 47; *Third Nat. Bank v. Stillwater G. Co.* 36 Minn. 75; *Newton v. Porter*, 69 N. Y. 133; *Bank of Commerce v. Fowler*, 93 Wis. 241; *Walker v. Daly*, 80 Wis. 222; *Farmers' & Traders' Bank v. Kimball M. Co.* 1 S. Dak. 388; *Ferguson v. Hillman*, 55 Wis. 181; *Pierce v. Holzer*, 65 Mich. 263; *Wat-*

son v. Thompson, 12 R. I. 466; *Cecil Bank v. Snively*, 23 Md. 253; *U. S. v. State Bank*, 96 U. S. 30; *Nat. Mahaiwe Bank v. Barry*, 125 Mass. 20; *Blenkinsopp v. Blenkinsopp*, 12 Beavan, 568, 586; *Lee v. Stone*, 5 Gill & J. 1; *Baker v. Bartol*, 6 Cal. 483; *Beach v. Bestor*, 45 Ill. 341. There had been no election of one of several inconsistent remedies, and the respondent was not seeking another or an inconsistent remedy. *Baker v. Baker*, 57 Wis. 382; *Standard Oil Co. v. Hawkins*, 74 Fed. Rep. 395, 20 C. C. A. 468; *Terry v. Munger*, 121 N. Y. 161; *Crossman v. Universal Rubber Co.* 127 N. Y. 34; *McLeod v. Evans*, 66 Wis. 401; *Francis v. Evans*, 69 Wis. 115; *Ferguson v. Hillman*, 55 Wis. 181.

DODGE, J. It is nowhere alleged that R. W. Roberts, one of the judgment debtors, is not entirely solvent, and the holder of abundant property out of which the judgment purchased by the plaintiff can be satisfied, while there is evidence given by the plaintiff to the effect that he is a man of considerable property. The answer objects to the maintenance of this action for the reason that the plaintiff has an adequate and complete remedy at law. It is difficult to see how that objection can be escaped. The judgment rendered against R. W. Roberts and the defendants jointly was upon a cause of action in tort for money obtained by fraud. Each is liable for the whole, and with no right of contribution, the one against the others. Until plaintiff shall have exhausted his clear legal and statutory remedy by execution, or shown futility of any effort so to do, he is not entitled to invoke the extraordinary aid of a court of equity to pursue the money received by these defendants, and impose a constructive trust upon their homestead purchased therewith. *Wolf River L. Co. v. Pelican B. Co.* 83 Wis. 426.

The fact, if it be a fact, that the plaintiff here, or the judgment plaintiffs from whom he purchased, have effectively released R. W. Roberts, cannot change the situation. One

cannot entitle himself to invoke the aid of a court of equity by voluntarily casting away his remedy at law, otherwise adequate and complete.

A further consideration is equally fatal to the maintenance of this action. The same cause of action is here presented as was presented in a court of equity in a former suit, where the court decided just what the remedy should be. It is an attempt to relitigate and obtain another and different judgment upon the same cause of action. By the decision in 96 Wis. the subject is wholly *res adjudicata*. The court there, with the facts all before it, decided and adjudged what remedy the plaintiffs were entitled to,—whether it should be that of a mere personal judgment, or whether it should be a rescission of the sale of the real estate, or, as might have been accorded under the issues in that case, whether there should be a charging of the funds in the hands of the defendants with a trust in favor of the plaintiffs in that action. From these several remedies the court has decided which is the proper one, thereby impliedly adjudicating against the others. The plaintiffs' only redress was a motion for a rehearing, which they did not see fit to make. Thereby they availed themselves of the one remedy, and cannot now maintain a new action for another and different one, to which the court has already adjudged them not entitled.

These views fully dispose adversely of the plaintiff's cause of action, and render unnecessary the consideration of other detail errors assigned against the judgment.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

107	250
114	[1] 82
114	[1] 87
107	250
115	[2]335
60 LRA	590

SLADKY, Respondent, vs. MARINETTE LUMBER COMPANY, Appellant.

May 18—June 21, 1900.

Special verdict: Instructions to jury: Negligence: Master and servant: Obvious defects: Failure to warn: Assumption of risk: Contributory negligence.

1. Where a special verdict is requested it is the duty of the trial court under sec. 2858, Stats. 1898 (providing that such a verdict shall be in the form of questions, in writing, relating only to material issues of fact and admitting of direct answers), to limit the questions to issuable facts, in contradistinction to mere evidence.
2. In an action for personal injuries sustained by an employee in defendant's sawmill while at work on the log deck, where the only negligence on defendant's part, put in issue by the pleadings, was failure to furnish a reasonably safe place to work and failure to instruct and warn plaintiff as to the risks and dangers of the employment, the court submitted to the jury, as part of a special verdict, the question, "Was the defendant guilty of negligence in *allowing* plaintiff to work upon its log deck?" and in connection therewith instructed them, among other things, that said question embraced most of the principal questions in the case, including the questions whether defendant's log deck was a reasonably safe one, and whether defendant was ignorant of the work to which he was put and should have been instructed by defendant; and that in answering it they should determine whether such log deck was a reasonably safe place in which to work, whether it was of a kind in common use, what knowledge plaintiff had about that sort of work, and whether he had exercised ordinary care and prudence in handling the logs. *Held*, that said question, which in itself did not cover any issuable fact, was made by the instructions to cover almost every issue that could have been covered by a general verdict; and that its submission defeated the very object of a special verdict.
3. Where the court sets aside, because against the uncontradicted evidence, the jury's finding to a question in the special verdict in such case, in substance, that log docks with substantially the same appliances as defendant's were not in common use, it should also have set aside the answer to other questions which, under the instructions of the court, the jury were at liberty to answer as they did on the sole theory that such appliances were not in common use.

4. Failure to instruct or warn an employee as to the risks and hazards attending the employment is not negligence, unless the employer knew, or ought to have known, that such warning and instruction was necessary.

5. In an action for personal injuries it appeared, among other things, that plaintiff, a man twenty-six years of age, had worked in saw-mills and among saw-logs for eight years; that he sought work from defendant inside its mill, stating he had rolled logs with a cant hook, though not onto a saw carriage; that the log deck of defendant's mill and its appliances were substantially the same as those in common use, the skids being unprovided with stops or barriers to prevent the logs from rolling or slipping too far when the carriage was in motion, which condition was open and obvious to plaintiff, and such as he was bound to recognize; and that before the injury plaintiff had worked on the log deck a day and a half and had handled 1,850 logs. *Held*, as a matter of law, that plaintiff assumed the risks of his employment.

6. In an action by a sawmill employee for personal injuries it appeared, among other things, that it was the proper, usual, and safe way to roll the logs down to where they were to be loaded onto the saw carriage when the carriage was back from the saw and in front of the skids on the log deck. *Held*, that plaintiff, having voluntarily chosen to roll the log down on the skids when the saw carriage was away, was guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Greene, Vroman, Fairchild, North & Parker*, and oral argument by *H. O. Fairchild.*

For the respondent there was a brief by *John Wattawa*, attorney, and *G. G. Sedgwick*, of counsel, and oral argument by *Mr. Sedgwick.*

CASSODAY, C. J. This action was commenced May 18, 1897, to recover damages for personal injuries sustained by the plaintiff, while in the employ of the defendant, April 28, 1896, rolling logs from the trough onto the iron skids, and down such skids to the saw carriage when in front of the saw.

Issue being joined and trial had, the jury returned a special verdict to the effect (1) that the defendant was guilty of negligence in allowing the plaintiff to work upon the log deck; (2) that such negligence was the proximate cause of the plaintiff's injury; (3) that the plaintiff was not guilty of negligence which contributed proximately to the injury; (4) that log decks with appliances substantially the same as the defendant's were not in common use; (5) that the defendant's log deck was not of approved construction for use in such mills; (6) that the defendant's log deck was not reasonably safe for an unskilled workman using ordinary care and prudence himself; (7) that the plaintiff did not tell defendant's agent at the time of his employment, or before his injury, that he had done such work before; (8) that the log which caused the plaintiff's injury was not a smooth one, with the bark off, but a new one, with the bark on; (9) that the work of attending the log deck required that the person doing so should be skilled otherwise than in the use of a cant hook; (10) that ordinary care and prudence on the part of the defendant required other stops or barriers to be used on its log deck than such as were used; (11) that the defendant was bound to inform the plaintiff of the dangerous character of the work; (12) that the plaintiff was entitled to recover as damages $5,000.

The fourth question so submitted to the jury, and their answer thereto, read as follows: "*Q.* 4. Were log decks with appliances substantially the same as defendant's in common use? *A.* No." The court corrected such finding by "striking out the answer, 'No,' to such question, as against the uncontradicted evidence in the case." Otherwise, the court refused the motion of the defendant to correct the verdict or grant a new trial. Upon such verdict so amended by the court, judgment for the plaintiff was ordered for the amount stated, with costs, and from the judgment so entered accordingly the defendant brings this appeal.

The log deck mentioned in the special verdict is described by counsel for the plaintiff substantially as follows: In the defendant's sawmill there was a large double deck, with a circular saw on one side and a band saw on the other side. The logs were drawn by an endless chain from the water, up and along a trough, into the mill, to a point between and opposite the log deck on the side of the band saw, as well as the log deck on the side of the circular saw, where the plaintiff worked. The logs were thrown out of the trough onto such decks by an eccentric operated by steam, after being brought into the mill by the endless chain. The deck on the side of the circular saw was composed of a heavy plank floor, running on a level in a direction parallel with the trough where the logs came up, and parallel with the carriage way along which the carriage runs which carries the logs to the saw. Such log deck declined or slanted down from the trough to the carriage way, which was thirteen feet in length at the point nearest the saw and sawyer, and was divided into three slants, of varying grades or declines. The first two feet and seven and three-fourths inches from the trough there was a drop of five inches (the defendant's witness testified, seven and three-fourths inches). The second decline was eight feet six inches long, with a drop of seven inches as shown by the plaintiff's witness (and five and one-fourth inches as shown by the defendant's witness). There was a space of twenty-one or twenty-two inches near the carriage way which was comparatively level, having a slight decline back from the carriage way towards the trough of one eighth of an inch (defendant's witness testified, about one inch). There were three skids on the deck running from the log trough to the carriage way, raised about six inches above the platform of the deck. The two nearest the saw and sawyer were made of T rails (railroad iron) bent to correspond to the several slants of the deck, and were round and smooth on the top. The one nearest

the sawyer was three feet ten inches from the bumper, and the other was eight feet and eleven inches further from the bumper. The third skid was of wood, with strap iron on top, and that also conformed in shape to the slant of the deck, and was six feet and three inches still further from the bumper. There was a square hole through the deck floor between the two railroad iron skids, about three feet square, for the bark to fall or be put through. There was a steam "nigger" located between the two railroad iron skids, used to put the logs from the skids onto the saw carriage, and of great power and rapidity of action, which was also used to turn the logs on the carriage when necessary, and was under the control of and operated by the sawyer. The nigger operated in a slot or opening in the deck from below, running from the carriage way back three or four feet toward the trough. When in operation it was lowered below the deck, and the top end carried back three or four feet from the carriage, to a point behind the log sought to be put on the carriage, and it was then raised up and pressed forward by steam power towards the carriage, and so forced the log onto the carriage. There were no other stops of any kind on defendant's log deck to prevent the logs, when thrown by the eccentric from the log trough onto the deck, from rolling or sliding clear down to or upon the carriage way except the depressions mentioned, and the nigger, when it happened to be up and in use, but it was not used for stopping the logs, its use being only for putting them on the carriage and turning them afterwards. To enable the deck hand to handle the logs or to keep control of them, it was usual to allow a few logs to remain on the skids, so that the logs from the trough, when thrown by the eccentric, would crowd against them, and be stopped and straightened preparatory to being put down by the deck hand to a place on the skids where the nigger could reach them and place them on the carriage. Only the smaller

logs were run over the deck on the side of the circular saw. The logs sawed during the day and a half while the plaintiff worked in the mill were from three to sixteen inches in diameter. Some of the logs were old, and some were new. The old logs had lost their bark considerably, and were smooth. During the day and a half the plaintiff worked there, he handled 1,850 logs, or about 130 logs per hour. The year before there had been little spikes of iron in the skid next to the sawyer, about two inches high, to prevent logs from sliding onto the carriage way. After the accident there were notches cut in the iron skid next to the sawyer for the same purpose — to prevent the logs from slipping. A man was necessarily employed on the log deck to stop the logs from coming down too far and too fast, and to straighten them and place one at a time down near enough to the carriage, so that the nigger could reach it and put it on the carriage. The proper place to put the log was at the slight turn or change of decline of the skid back towards the trough about two feet from the carriage, called by some witnesses the "depression," and denominated by the defendant's counsel as the "saddle." The proper time to place the log in position was when the carriage came back to that place for the log, so that there would be no delay in getting it with the nigger. The proper place for the deck man to stand and do his work was at the end of the log furthest from the sawyer.

In describing the accident the plaintiff's counsel states, in effect, that after working a day and a half, and handling 1,850 logs, the plaintiff undertook to handle a small, smooth, slippery log, standing at the end furthest from the sawyer, and was trying to get it down in proper time to be put upon the carriage; that the end of the log opposite the plaintiff, or nearest the saw, slipped over onto the carriage way; that the carriage, as it came back from the saw, caught the log and threw it against the plaintiff, and injured his leg so as

to make amputation necessary; that the plaintiff saw the carriage coming as the log was sliding over into the carriage way, and tried to stop it, but failed.

The complaint, among other things, alleges, in effect, that the log the plaintiff was attempting to handle at the time of the injury was without bark, and the first one in that condition which he had occasion to move from the log deck to the lower end of the skids; that the plaintiff did not know, and was not informed or warned in advance, that logs without bark had a tendency to slide in the manner described, nor the resulting danger. The general denial in the answer put such allegations in issue. As indicated, the jury determined that issue in favor of the defendant, and found (8) that the log which caused the plaintiff's injury was not a smooth one, with the bark off, but a new one, with the bark on.

The only breaches of duty or negligence of the defendant alleged in the complaint were the failure of the defendant to furnish a reasonably safe place in which the plaintiff was required to do his work, in that such skids were "unprovided with any stops or barriers to prevent logs from rolling or slipping too far while the carriage was in motion, whereas each skid should have had in its upper edge or surface, at and near the lower end thereof, curved depressions or indentations, or some other suitable and sufficient barriers to hold firmly and steadily logs in waiting and in readiness to be rolled upon the log carriage;" and, secondly, the failure of the defendant to instruct and warn the plaintiff of the tendency and liability of slippery logs, without bark, to slide along the skids, beyond the ends thereof, into the space provided for the passage of the saw carriage, from the mere force of gravity, and without any effort at rolling them, and failed to inform the plaintiff of the risks and dangers of the work.

The answer put those allegations in issue, and also the

allegation of the complaint that the plaintiff was free from contributory negligence.

The defendant having requested a special verdict, the court was required by the statute to prepare such verdict "in the form of questions, in writing, relating *only to material issues of fact and admitting a direct answer*," and to which the jury were required to make answer in writing. Sec. 2858, Stats. 1898. That statute has very frequently been construed "to limit such questions to such facts as are controverted and put in issue by the pleadings, or, at most, to such as might properly have been put in issue by the pleadings,"—that is to say, "issuable facts, in contradistinction to mere evidence." *Davis v. Farmington*, 42 Wis. 431; *Eberhardt v. Sanger*, 51 Wis. 74–77, and cases there cited; *Heddles v. C. & N. W. R. Co.* 74 Wis. 257, 258, and cases there cited; *Montreal River L. Co. v. Mihills*, 80 Wis. 551–554, and cases there cited; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 362; *Bigelow v. Danielson*, 102 Wis. 473. True, it is said in those cases that the form of the verdict is very much in the discretion of the trial court, but the facts submitted should be limited as indicated. Here the questions submitted were mostly in total disregard of such limitations. Several of the questions so submitted relate wholly to evidentiary facts.

The first question submitted to the jury is this: "Was the defendant guilty of negligence in *allowing* plaintiff to work upon said log deck?" The plaintiff was twenty-six years of age. He had worked in mills and among saw-logs for eight years. There is no pretense that he was not a man of ordinary intelligence. He had, for two or three weeks before he commenced work, been urging the defendant to allow him to go to work in the mill. He saw what the work upon the log deck was, before he commenced, and had been engaged in such work for a day and a half before such injury. It is difficult to perceive how negligence could

be predicated upon the mere fact of "allowing" the plaintiff to go to work on the log deck. No such issue was raised by the pleadings, nor was it an issuable fact. It may have had some remote bearing upon the questions in issue,—whether the log deck was dangerous, and whether the plaintiff was instructed or warned by the defendant of the dangerous character of the work before he commenced; but, as indicated, those facts could only be properly submitted by direct questions admitting of direct answers.

But the trial court took a different view of the subject, and so, after reading the question, said to the jury: "This question embraces most of the principal questions in this case, although the following questions call upon you to answer specifically as to certain other facts which are to a greater or less extent included in this first question. This first question embraces the question as to whether or not the defendant's log deck was a reasonably safe one; also, the question as to whether or not the plaintiff was ignorant of this work to which he was put,—of rolling on logs,—and should have been instructed by the defendant." And again, after instructing the jury generally and at length as to the duty of the master, and, among other things, to the the effect that the defendant was not liable in damages for an error in judgment in selecting one kind of machinery or appliance, on proof that another method or appliance was better or safer, "when both methods or appliances" were "in common use,"—the jury were told that the question for them to determine in answering that "first question is: Was this log deck a reasonably safe place in which the plaintiff was to work? *Was it in common use?* Was it reasonably safe?" And then, after instructing the jury generally on the subject of negligence and ordinary care, and promising further instructions upon the duty of the employer to inform and instruct the servant, the jury were told to consider the evidence carefully,—"the construction

of the log deck, and whether or not it was one of a kind in common use, whether it was reasonably safe; the knowledge which the plaintiff had of that sort of business, or his lack of knowledge; whether or not he exercised ordinary care and prudence himself in handling the logs,"— and then determine from all the circumstances "whether or not the defendant was guilty of negligence by allowing the plaintiff to work upon said log deck." Thus the illegitimate question so submitted was made by the charge, contrary to the ruling of this court, to cover almost everything that could have been covered by a general verdict. *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 362. Such submission and such general charge were well calculated to defeat the very object of a special verdict, and were contrary to the spirit, if not the express ruling, of this court in *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215.

Under the charge of the court, most of the other questions submitted to the jury were, respectively, mere subdivisions of the first question so submitted. And yet the trial court, on motion to correct the verdict, refused to set aside the answer of the jury to that first question, and "ordered that said motion, as to the fourth question, to wit, 'Were log decks with appliances substantially the same as defendant's *in common use?*' be granted, to the extent of striking out the answer, 'No,' to such question, *as against the uncontradicted evidence in the case.*" If the answer of the jury to that fourth question, to the effect that log decks with appliances substantially the same as defendant's were not in common use, was "against the uncontradicted evidence in the case" (that is to say, if the "uncontradicted evidence in the case" is to the effect that such log decks were in common use), then the court should have set aside the answer to the first question, since, under the charge of the court, it may, like their answer to the fourth question, have been based solely on the theory that such appliances were not in common use. The

same is true as to the fifth, sixth, and tenth questions, respectively, since, under the instructions of the court, the jury were at liberty to answer each of those questions, as they did, on the sole theory that such appliances were not in common use.

It is well settled in this court that "the test of negligence in such a case is the presence or absence of that degree of care which ordinarily prudent persons are accustomed to observe about the same or similar affairs in similar circumstances." *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 483; *Innes v. Milwaukee*, 96 Wis. 170-174; *Prybilski v. N. W. C. R. Co.* 98 Wis. 413, 416.

There is another defect in this verdict, bearing upon the question of instruction and warning. The complaint alleges, in effect, that the plaintiff "was ignorant of the risks or hazards attending" such employment, "as the defendant well knew when it set him at work." Such allegations were put in issue by the answer. The jury found that the plaintiff did not tell the defendant's agent at the time of his employment, nor before his injury, that he had done such work before, and that the defendant was bound to inform the plaintiff of the dangerous character of such work. But there is no finding to the effect that the plaintiff was ignorant of the risks or hazards attending such employment,—much less, that the defendant had knowledge of such ignorance. Those questions were left, therefore, undetermined. Certainly the defendant was not negligent for failure to instruct or warn the plaintiff, unless it knew or ought to have known that such warning or instruction was necessary. *Klochinski v. Shores L. Co.* 93 Wis. 417; *Deisenrieter v. Kraus-M. M. Co.* 97 Wis. 279. Under the charge of the court, the jury were at liberty to base their answer to the last of those questions upon the plaintiff's want of age, knowledge, experience, or comprehension.

It is well settled that "an employee of mature years, even

though inexperienced and uninstructed in the particular business, will be presumed to have known and assumed the risk incident to obvious defects or dangers, although they existed in consequence of the negligence or default of the employer." *Hazen v. West Superior L. Co.* 91 Wis. 208; *Jones v. Sutherland*, 91 Wis. 587; *Erdman v. Illinois S. Co.* 95 Wis. 6, 11; *Larsson v. McClure*, 95 Wis. 533; *Osborne v. Lehigh Valley C. Co.* 97 Wis. 27; *Powell v. Ashland I. & S. Co.* 98 Wis. 35; *Dahlke v. Illinois S. Co.* 100 Wis. 431; *Dugal v. Chippewa Falls*, 101 Wis. 533. It is true that in charging the jury upon that question the court said that "where a defect or danger is open or obvious to a person of ordinary intelligence and judgment, although it exists in consequence of the negligence or default of the employer, knowledge of it on the part of the employee of mature years will be presumed." But the court virtually took from the jury the question of the assumption of risk, by charging them in the same connection as follows: "Where the danger is open and obvious, and the servant is of sufficient age and intelligence, and has sufficient knowledge, to comprehend danger, *then he assumes the risk.*" And again: "Where a master neglects to instruct a servant of that character in respect to the dangers of his employment, the servant cannot be held to have assumed the risk." These instructions were to the effect that, even if the danger was "open and obvious," yet the plaintiff did not assume the risk, unless the jury should be of the opinion that he was of sufficient age, and had sufficient knowledge and intelligence, to comprehend the danger, nor unless the defendant had instructed him in respect to the dangers of his employment. And yet the jury did not find, and were not asked to find, that the defendant knew that the plaintiff was in need of instruction or warning. The question of contributory negligence was virtually submitted to the jury without instruction, and in such a way as to authorize them to find for the plaintiff if "he

handled the logs as well as he knew how to," and was not negligent for not knowing better. The questions of the assumption of risk and contributory negligence are not thus to be ignored, nor summarily disposed of.

It is admitted that that the plaintiff was twenty-six years of age at the time of the injury; that he began working about sawmills eight years before, principally upon the outside in the summer, and in the lumber woods in the winter; that he so worked at Garden Bay, Michigan, for five summers and winters; that during the last summer he was there he worked two months at the lath mill,—inside the mill,—pulling bolts through the lath machine; that each of such five winters at Garden Bay he worked in the woods, swamping and rolling logs with a cant hook on and off skids and sleighs (the skids at times being level, and at other times being more or less inclined or declined, and covered with snow and ice); that he worked the same way for three summers and winters at the defendant's mill at Marinette (the first summer in the yard, and the other two summers inside the mill); the first summer taking edgings from the edger and throwing them upon the slasher; that the second summer he worked in front of the gang saws, chopping the corners from the cants and helping to move them with a peevy, or lumberman's cant hook, having a metal-socket pick, into place for sawing; that during the three winters prior to his injury he worked in the woods, swamping and rolling logs with a cant hook on and off skids and sleighs, and for a short time assisted in loading logs from skids onto steam cars, using a cant hook in rolling and keeping them straight as they were being loaded; that for two or three weeks before the injury he sought work from the defendant inside of its mill; that finally the defendant's foreman showed him the log deck, where there was a man rolling logs, and asked the plaintiff if he ever rolled logs with a cant hook, and he said, "Yes, but not onto a saw carriage;" that the plaintiff then

took the cant hook and started to roll the logs down; that he knew the foreman meant for him to roll logs from the log deck to the carriage, and would have known that without having been shown.

With his age and experience, it is idle to say that the plaintiff did not know that, when logs were thrown by the eccentric from the log trough onto the log deck, they would roll down on the skids, at least to the first drop mentioned, and that, if they were started down the skids from such first drop, they would roll down, at least to the second drop, where the skids descended back towards the trough, with the liability of going to the end of the skids and against the carriage, if it was there, and over the end of the skids into the path of the carriage, if it was not there. Such would necessarily be the result from the condition of the skids and the force of gravity. The condition of the skids was open and obvious to the plaintiff, and such as he was bound to recognize, as well as the force of gravity. There was nothing uncertain, obscure, or complex in the situation. As found by the trial court, it appears from the uncontradicted evidence that the defendant's log deck, with its appliances, was substantially the same as those in common use. Such being the conditions, we must hold, as a matter of law, that the plaintiff assumed the risk. See cases cited in *Helmke v. Thilmany*, *ante*, p. 216, and *Renne v. U. S. L. Co.*, *post*, p. 305.

It is undisputed that there was a proper, usual, and safe way for the plaintiff to do such work. His proper place was at the end of the log furthest from the sawyer. The proper time for him to get the log down to the depression nearest the foot of the skids, from which it could be taken by the nigger and loaded onto the carriage, was when the carriage was back from the saw and in front of the skids. Had the plaintiff observed such usual mode of doing the work, it would have been impossible for the log to roll or slide off the skids, since the carriage would have been there

to prevent it. Having failed to get the log down to such depression nearest the foot of the skids, while the carriage was in front of them, nor until after the carriage had passed back towards the saw and beyond the skids, it was the plaintiff's duty to wait until the carriage returned in front of the skids before rolling the log down on that depression. The plaintiff voluntarily chose the unusual and unsafe way of doing the work, instead of the usual and safe way, and hence was guilty of contributory negligence. *Larson v. Knapp, Stout & Co. Company*, 98 Wis. 178; *Rysdorp v. George Pankratz L. Co.* 95 Wis. 622, 626; *Welsh v. Argyle*, 89 Wis. 649; *Lockwood v. C. & N. W. R. Co.* 55 Wis. 66.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

LEMMIN, Plaintiff in error, vs. LORFELD and another, Defendants in error.

107 264
110 683

May 18 — June 21, 1900.

Parent and child: Custody of minor children.

A father of girls aged seven and nine years, respectively, is unsuitable to have their care and custody, where it appears that he is mentally weak, to an extent rendering him incapable of doing business intelligently; that he is very excitable and is accustomed to apply bad names to his children and drive them from his presence by profanity and abuse: and that in consequence thereof they are becoming unmanageable.

ERROR to review a judgment and order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The plaintiff in error sued out a writ of *habeas corpus* in the circuit court for Sheboygan county for the purpose of obtaining the custody of two of his daughters, who were at

the time of the issuing of the writ of the ages of nine and seven years, respectively. The defendants in error had possession of the children, the defendant *Louisa* being their maternal aunt; and they justified their possession principally upon the ground that the plaintiff in error was an unsuitable person to have the charge and bringing up of the children. It appeared by the evidence that the wife of the plaintiff in error, the mother of said children, had died of consumption October 16, 1898; that before her death she had requested that the said children should go to her parents or sisters, for a home, and that the plaintiff in error had assented thereto; that after the funeral of the mother, on the 19th of October, 1898, the children were taken by the *Lorfelds* against the objection of the plaintiff in error, and have remained with the *Lorfelds* ever since, who have taken care of them, and are financially able to do so. The circuit court found that the plaintiff in error was not a suitable person to have the care and custody of said children; that the defendants in error were suitable persons to have such care and custody; and that the best interests of the children required that they remain in the custody of the defendants in error. Thereupon the writ of *habeas corpus* was dismissed, and the children remanded to the care and custody of the defendants. This judgment was rendered in June, 1899, and on the 29th day of July, 1899, the plaintiff in error filed a petition praying for the vacation of the judgment, upon which petition testimony was taken, and the same was denied October 11, 1899, whereupon the plaintiff in error sued out this writ.

Simon Gillen, for the plaintiff in error.

Francis Williams, for the defendants in error.

WINSLOW, J. The right of a father to the custody and education of his children, and the facts which may defeat that right, were so fully and comprehensively discussed by the late Mr. Justice PINNEY in the opinion in the case of

Markwell v. Pereles, 95 Wis. 406, that no time need be spent in any further discussion of the subject here. The conclusions there reached were, in brief, these: Under the common law, and by the terms of our statute (sec. 3964, Stats. 1898), the father has the right to the custody, care, and education of his minor children, unless it be shown that he is unfit or unsuitable for the trust. Uusuitableness is not to be found merely because the father may be in straitened circumstances, or may not be as discreet or judicious as could be wished, nor because other persons, of greater means or better social standing, stand ready and willing to take the child and give it greater advantages. If such were the test, the father's right would be reduced to a mere shadow, of the most unsubstantial character. But it must appear that the father has "so conducted himself, or shown himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended,—should be superseded or interfered with."

Applying these principles to the present case, we find that the court has here determined, after hearing the testimony and seeing all the parties and their witnesses, as well as the children themselves, that the father is "not a suitable person" to have the care and custody of the children in question, and that the defendants in error are suitable persons for such trust. We should have been better satisfied had the court specifically stated the facts which rendered the father unsuitable, but, on examination of the record, we find that the facts relied on to show such unsuitableness were that the father was weak mentally, to an extent rendering him incapable of doing business intelligently; that he was very excitable, and accustomed to swear at his children, especially an older boy, applying bad names to them, and driving them from his presence by profanity and abuse; and

that as a consequence of such treatment the children, especially the elder boy, were becoming unmanageable. There was considerble testimony, by apparently disinterested witnesses, which tended strongly to substantiate these facts. It is true that there was considerable testimony to the contrary, but, construing the finding reasonably, we think it must be held to be a finding that these claims of unfitness were established by the evidence; and, considering the greater advantages of the trial court to determine the facts, we must hold that the finding is based upon sufficient evidence and must stand. Such conduct on the part of the father certainly renders him unsuitable to have the care of children. It makes him a person of such description "as to render it not merely better for the children, but essential to their safety and welfare, in very serious and important respects," that their custody and education should be placed in the hands of others.

By the Court.— Judgment and order affirmed.

DODGE, J., dissents.

METZGER, Respondent, vs. HOCHREIN, Appellant.

May 18 — June 21, 1900.

Nuisance: Unsightly fence: Obstruction to view: Pleading.

1. In an action to restrain an alleged nuisance, a complaint — alleging, in substance, that plaintiff is possessed of an attractive house surrounded by lawns; that defendant, owning the adjoining lot, built a fence four feet from plaintiff's house, but entirely on defendant's land, consisting of rough tamarack posts, from eight to sixteen feet high, and old, unsightly, and partially decayed lumber of varying lengths, which fence extended back about ninety feet from the street, and was supported by wires strung from the tops of the posts to defendant's house; that the fence shut off the view from the

house to the street, injured the value of the property for rent or sale, and was wilfully and maliciously erected — fails to state a cause of action.

2. In the absence of physical injury to adjoining property or its occupants, one may use his own land or erect on it any structure he may see fit, regardless of the unreasonableness or maliciousness of his motives, even if by so doing the adjoining property is rendered less valuable and desirable by diminished beauty of surroundings, access of light, and opportunity to see it from the surrounding territory or to freely view such territory therefrom.

APPEAL from an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to restrain an alleged nuisance on facts set forth in the complaint in substance as follows: Plaintiff owns lots 5, 6, 7, and 8 of block 15, division 1, in the village of Glenbeulah, Wisconsin, on which she has a dwelling house located about four feet from the west line, surrounded by made lawns and yards, making an attractive and valuable home. Defendant owns the adjoining lot on the west of plaintiff's land, in connection with other lots, on which he has a dwelling house, located about fifty feet from the division line. July 22, 1899, defendant set rough tamarack posts, from eight to sixteen feet high, along said division line, wholly on his own land, about four feet from the line of plaintiff's dwelling house, and extending back from the street front about ninety feet. He strung wires from the tops of such posts to his house, in order to hold the posts firmly in position, and on and supported by such posts he constructed a tight board fence of rough, old, unsightly, and partly decayed lumber taken from an old ice house, such fence being from eight to sixteen feet high, the highest part being opposite the windows in plaintiff's house. Said structure is, by reason of its unsightly character and proximity to plaintiff's house, a nuisance. It was wilfully and maliciously erected. It partially shuts off the view from plaintiff's house to the street and from the street to the house,

greatly injures the value of the property for rent or sale, and if it be permitted to continue the use of such house as a dwelling place will have to be abandoned.

The defendant demurred to the complaint upon the ground that it fails to state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals.

M. C. Mead, for the appellant.

A. C. Shaw, for the respondent.

MARSHALL, J. The question presented here is, May a person rightly use his own land as he sees fit, regardless of his motives, if that use render adjoining property less valuable and desirable for dwelling-house purposes, merely from diminished beauty of surroundings and access of light to the property, and opportunity to see it from the surrounding territory and to freely view such territory therefrom, there being nothing projected from the adjacent land causing any injury to such property or its occupants? It will be noted that it is not claimed the acts complained of caused any physical injury to plaintiff's property or to the occupants thereof. The sole complaint is that the beauty and cheerfulness of the property has been injured by defendant's conduct, and that the structure complained of was erected unreasonably and with malicious motives. So the case comes down plainly to the inquiry stated.

It is not an easy task to define with clearness what constitutes a nuisance, so that each case, as it arises, can be accurately tested thereby. Probably the language of Wood on Nuisances, at § 1, often quoted with approval by this court, comes as near strict accuracy as the nature of the subject will permit: Every unlawful use by a person of his own property in such a way as to cause injury to the property rights of another, producing material annoyance, inconvenience, discomfort, or hurt; and every enjoyment by one of

his own property which violates the rights of another in an essential degree, constitutes an actionable nuisance. In applying that to any given state of facts, it must be kept in mind that the injury referred to, whether to property or the occupants thereof, is physical. A trade may be carried on in such a way, either by polluting the atmosphere or by creating such disturbances as to cause physical inconvenience to the occupants of adjoining property, as to constitute a nuisance within the rule stated; but acts which do not reach the adjoining property in a physical sense, yet diminish its value and desirability for a particular use, as for dwelling-house purposes, have not been supposed to constitute an actionable nuisance. True, there are decisions in the state of Michigan, and some *dicta* of courts elsewhere, to the effect that, if one maliciously use his own property to the annoyance of his neighbors, regardless of any physical discomfort to them, he is guilty of an actionable nuisance; the element of malice rendering that an actionable wrong which would otherwise be rightful. That doctrine, however, has very little support. None, in fact, where the rules of the common law have not been changed by legislation and the courts have kept strictly within their legitimate sphere as administrators of the law. The general rule is that whatever a man may lawfully do on his own property under any circumstances, he may do regardless of the motive for his conduct. 16 Am. & Eng. Ency. of Law, 930; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Mahan v. Brown*, 13 Wend. 261; *Phelps v. Nowlen*, 72 N. Y. 40; *Bordeaux v. Greene*, 22 Mont. 254; *Rideout v. Knox*, 148 Mass. 368; *Guest v. Reynolds*, 68 Ill. 478. That doctrine is as well defined in the common law as any that has to do with the rights and remedies cognizable by courts, and courts that have departed from it have, as it seems, trespassed upon the domain of the legislative department of the government.

In *Rideout v. Knox*, *supra*, the power of the legislature

even was questioned to curtail the use by a person of his own property to the extent of preventing its malicious use, the act under consideration being one to prevent the maintenance of unreasonably high fences from malicious motives. The court said, in effect, that the ownership of land carries with it the constitutional right to enjoy such land in any way the owner sees fit, limited only to such external effects as diminish the physical enjoyment of adjoining property; that such right, regardless of the motive for its exercise, is a property right within constitutional protection, the same as any other property right, and cannot be interfered with except to the extent of reasonable police regulations; that legislation preventing the unreasonable maintenance of a high fence, where a bad motive is the sole purpose thereof, is within the limits of the constitutional exercise of police power. But it was intimated that legislation, prohibiting the maintenance of a fence where a bad motive for such maintenance is coupled with some other that would cause it independent of the mere desire thereby to annoy an adjoining owner, would contravene constitutional rights of property. The result of the case was that, but for the statutory police regulation of the height of fences, the plaintiff would have been remediless regardless of the height of the fence in question or the motive for erecting and maintaining it.

In the very recent case of *Bordeaux v. Greene, supra,* where the fence complained of was forty feet high, the court said that the right of one landowner to erect a structure so as to shut off air and light from the windows of a building on adjoining property, is unaffected by the motive; therefore, that whether the fence in question was erected as an improvement or ornament to the property on which it was located, or purely to annoy adjoining landowners, made no difference as to the legal right to maintain it.

With few exceptions, the authorities are all in harmony

with the foregoing, clearly indicating that the complaint in question fails to state a cause of action, and that the demurrer was improperly overruled.

This is one of the many cases that may arise where the doctrine of personal liberty and personal dominion of one over his own property enables him to do things to the annoyance of others, not causing actual, material physical discomfort to them, for which there is no punishment, except loss of that respect which every right-thinking man desires from his neighbors, and the possession of which is a source of daily enjoyment. If one is so constituted as not to be susceptible to those feelings which a reasonably well-balanced man is supposed to possess, and is so constituted as to obtain more pleasure out of needlessly annoying others than by securing and retaining their respect as a manly member of society, his sovereign right in his own property, to use it as he may so far as that use does not physically extend outside his boundaries to the detriment of others, may be so exercised as to violate the moral obligations which every member of society owes to his neighbors, without any penalty being visited upon him for his misconduct, of which he can be made conscious.

By the Court.— The order overruling the demurrer is reversed, and the cause remanded for further proceedings according to law.

As to liability for malicious erection of fence, see note to *Letts v. Kessler* (54 Ohio St. 73), in 40 L. R. A. 177.— REP.

SHAFT, Respondent, vs. CAREY and others, Appellants.

107 273
108 500
m108 502
107 273
52 LRA 514
107 273
s115 155
s115 159

May 18 — June 21, 1900.

Landlord and tenant: Leaseholds: Appurtenances of ingress and egress: Restrictions in lease: Injunctions.

1. Appurtenances of ingress and egress essential to the use of leased premises and reasonably within the contemplation of the parties at the time of the leasing are as much a part of the estate conveyed as the premises specifically described. Thus, where a passageway and door connecting the office of an hotel with a room in the same building leased for a saloon or bar room existed at the time of a renewal of the lease and were essential to the proper use and enjoyment of the demised premises, the right to use them became part and parcel of the leasehold interest and could not lawfully be interfered with by the lessor or his grantees during the term.
2. After the demise of a room in a hotel for a saloon for the term of one year, which was renewed for four years, changes were made whereby the demised room was connected by a door and passageway with the hotel office. There was no agreement in the lease as to such door and passageway or their use in connection with the demised premises. *Held* that, basing his right to relief upon his lease, the tenant could not maintain an action against the landlord for closing the door and passageway unless it definitely appeared that they existed when the lease was renewed.
3. Where a tenant leased for a saloon a room adjoining the office of his landlord's hotel, with the exclusive privilege of selling liquors and cigars in the hotel block, and the landlord built an annex to the hotel, adjoining the office, used the side of the hotel block as a wall for the new erection, cut a doorway from the hotel office into the annex, and closed the one leading into the room occupied by the tenant, the annex became a component part of the hotel block, and its construction was a mere subterfuge to avoid the consequences of the restrictions of the lease, and entitled the tenant to enjoin the selling of liquors and cigars therein.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

On July 1, 1897, the plaintiff leased of the defendant *Carey*

the saloon or bar room of the Palmer House, in the city of Fond du Lac, for the term of one year, with the privilege to extend the same for four years longer. The lease contained a stipulation that the plaintiff was to have the exclusive right to sell liquors and cigars in the "Palmer House Block." Plaintiff went into possession, and, at the expiration of his term, gave due notice of his election for an extension. On November 12, 1898, *Carey* leased to the defendant *Matchette* the hotel building known as the "Palmer House," except certain rooms that had theretofore been leased to others, for a period of five years. This lease contained a stipulation that the "lessee is not to sell or permit to be sold any wine, beer, or liquors, or any kind of cigars, in said hotel, except as is hereafter agreed." After the original lease was made with plaintiff, and in the years 1897 and 1898, *Carey* made changes in the inner construction of the hotel, and brought the office and reception room for guests down to the ground floor in the room adjoining the room leased to plaintiff; constructing a passageway between said rooms, placing only a partial screen, by swinging door, with a large glass panel, with the word "Bar" painted thereon, across the same, opening in and out on a swing hinge. This, it is claimed, was done pursuant to an agreement made at the time said first lease was made. After setting out the facts stated, the complaint alleges that the defendants became jealous of his rights and privileges under his lease, and attempted to avoid the covenants in said lease, and conspired to take away the profits derived from the exclusive right to sell cigars and liquors in said building, and to that end built a lean-to on the east end of the hotel building, using the east wall of the hotel building as one side of the new building, fitted it up for saloon purposes, opened a door from the Palmer House billiard room into said building, and commenced selling liquors and cigars therein. On May 11, 1899, in the night-time, the defendants closed up and barricaded the door lead-

ing from the hotel office to plaintiff's saloon, and cut off his connection therewith. The plaintiff brings this action to require the defendants to remove said barricade, and to restrain them from selling liquors and cigars in the so-called "Palmer House Annex."

The defendants answered, setting up the lease to *Matchette*, admitting the closing up of the door, the building of the "Annex," and the sale of liquors and cigars therein, but claimed that the so-called "Annex" was not a part of the Palmer House Block, and was not covered by the stipulation in plaintiff's lease. The defendant *Taylor* answered, denying any interest, and alleging that he was merely an employee and agent of the defendant *Matchette*. Upon certain affidavits, showing that the name "Palmer House Block" was confined to the building itself, and did not cover any of the adjacent land owned by *Carey*, and upon the answers of the defendants, a motion was made to dissolve the temporary injunction obtained by plaintiff, restraining them from selling liquors or cigars in the "Annex." A counter motion was made by plaintiff for judgment upon the pleadings. The latter motion was granted, and from the judgment so entered the defendants have appealed.

For the appellants there was a brief by *Bloodgood, Kemper & Bloodgood*, attorneys, and *Jackson B. Kemper* and *H. H. Hayden*, of counsel, and oral argument by *Mr. Hayden*.

For the respondent there was a brief by *Edward S. Bragg*, and oral argument by *John I. Thompson*.

BARDEEN, J. The plaintiff's motion for judgment ought not to have been granted unless it can be said that every fact essential to his entire cause of action has been alleged, and has not been put in issue by the defendants' answers. By his complaint the plaintiff seeks to have the barricade erected by defendants at the rear door of his saloon removed, and also to restrain the sale of liquors and cigars in the so-

called "Annex." The first ground of relief rests upon the implied covenant of quiet enjoyment of the leased premises, and the other upon the positive covenants contained in his lease, giving him the exclusive right of sale of liquors and cigars in the Palmer House Block. Whether any ground for relief exists as to the first question suggested depends upon the facts alleged regarding the leasing of the premises. The premises covered by the lease are mentioned as the "saloon or bar room of the Palmer House," including the card rooms contiguous thereto; also, a coal bin in the basement, and space therein for his ice box and for the storage of liquors. It appears that at the time the original lease was made the office and guest room of the hotel were on the second floor of the hotel building, somewhat remote from the room in question. It is not clear from the complaint just how they were connected, although there is an allegation that there was interior communication thereto from the office of the hotel. By subsequent allegations of the complaint it appears very clearly that the passageway leading to the door that was closed up was not in existence at the time the original lease was made. It is alleged that, as an inducement for plaintiff to enter into a lease for said room, *Carey* represented that it was his purpose to bring the hotel office and reception room for guests to the lower floor of the building, "and by a door connect the said office and reception room immediately with the said Palmer House saloon or bar room." It is also further alleged that down to May 11, 1899, *Carey* fully complied with the terms of said lease, "and also, in the years 1897 and 1898, made the changes in the inner construction in said hotel, and brought the office and reception room for guests down from the second floor to the ground floor, in the room next adjoining the rooms leased to the plaintiff, constructing a passageway between the said rooms, and placing only a partial screen, by a swinging door with a large glass panel, with the sign 'Bar' painted thereon,

across the same, opening in and out upon a swinging hinge." Whether this was done and completed prior to the renewal of the lease on July 1, 1898, the complaint fails to state. It is evident from the terms of the lease that the proximity of the room leased to plaintiff to the adjoining rooms of the hotel was a matter of importance to the parties, and bore a direct relation to the value of the leasehold. When the lease was renewed in 1898, the plaintiff was entitled to the enjoyment of his leasehold interest with the appurtenances of ingress and egress as they then existed. In other words, when a person leases a room in a building, with doors and passageways so connected with other rooms as to be essential to the use and enjoyment of the one leased, the law implies a covenant that such use shall not be interfered with during the continuance of such term. The appurtenances of ingress and egress, essential to use and reasonably within the contemplation of the parties at the time of the leasing, are as much a part of the estate conveyed as the room itself, and any interference therewith is an invasion of the rights of the lessees for which the law affords a remedy. But the implied covenant of quiet enjoyment only applies to conditions in existence at the time of the leasing. It does not extend to things not *in esse* at the time of the demise. 1 Taylor, Landlord & T. § 256. The statute (sec. 2204, Stats. 1898) to the effect that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not, does not apply to leasehold estates. This is the rule now established in New York, from which our statute was taken, although a different conclusion was first arrived at. *New York v. Mabie*, 13 N. Y. 151. If the door and passageway in question existed at the time the lease was renewed, and were essential to the proper use and enjoyment of the estate conveyed, the right to such use was more than a mere privilege or easement. It becomes a part and parcel of the leasehold interest, binding upon the lessor

or his grantees. Plaintiff being in possession of the rooms at the time *Matchette* took his lease of the hotel building, the latter was charged with notice of the plaintiff's rights and interests in the premises, and could claim no greater privileges than his lessor. *First Nat. Bank v. Chafee*, 98 Wis. 42, and cases cited. Our great difficulty has been to determine what the precise conditions were at the time the lease was renewed. It is quite certain from the complaint that, at the time the original lease was made, the door and passageway in controversy were not in existence. The allegation of the complaint that the changes in the inner construction of the hotel were made and the office brought down to the first floor "in the years 1897 and 1898" is not an allegation that the door and passageway existed when the lease was renewed. The plaintiff bases his right to relief upon his lease, and, unless some right expressly or impliedly granted thereby has been invaded, he has no legal ground of complaint. If the door and passageway were constructed *after* the lease was renewed, the use of them by plaintiff was merely permissive, and could be revoked at any time, so far as any covenant in the lease is concerned. To entitle the plaintiff to a judgment requiring the removal of the barricade to the door, the complaint should have alleged with definiteness the precise condition of things at the time of the renewal, or proof should have been taken so that the court could have been advised of the facts as a basis for judgment. The failure to furnish such basis, either by definite allegation or proof, is fatal to the judgment rendered.

The other feature of the case relates to plaintiff's right to an injunction restraining the sale of liquors and cigars in the so-called "Palmer House Annex." Defendants' contention is that the restriction in the lease cannot be construed to cover the addition made to the "Palmer House Block" after the lease was executed. The exclusive right of sale of the commodities mentioned, granted plaintiff by his lease,

was a valuable one. Such right was recognized in the lease of the hotel from *Carey* to *Matchette*, in which the latter bound himself not to sell the same, or permit them to be sold, in the hotel, except as he might secure plaintiff's lease. *Matchette* knew of plaintiff's rights, and recognized them so far as to make the pledge above referred to. Such being the case, it is immaterial to determine whether the covenant in plaintiff's lease is such as to run with the land. The defendants claim, however, that the grant of the exclusive right to sell in the "Palmer House Block" ought not and cannot be construed to cover the addition subsequently built. The building of the addition was a mere subterfuge to avoid the consequences of the restrictions in the leases. The Annex became and is a component part of the hotel building. One of its walls is one of the walls of the hotel, without which the Annex could have no existence. It is directly connected with the main building by proper doors and entrances. If it were entirely disconnected with the hotel building, we should be compelled to say that the language of the plaintiff's lease could not be construed to cover lands outside of the building known as the "Palmer House Block." But when the added structure became an integral part of the block, so constructed and designed to be such, the covenant, being continuing, should be construed to cover the block in its entirety, in whatever shape it may be, during the life of the lease. The law will not uphold a mere trick or subterfuge admittedly adopted to defeat the plaintiff's rights. The denial of the motion to dissolve the injunction needs no justification, any further than a statement of the facts.

For the reasons stated, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

By the Court.—So ordered.

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109 567
107 280
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107 280
58 LRA 899

BABCOCK, Administratrix, Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 18—June 21, 1900.

Railroads: Eminent domain: Recovery for land taken without condemnation: Estoppel: Petition: Description of the premises: Jurisdiction: Necessity of the taking.

1. A railroad company constructed its roadbed so that a portion of the embankment extended onto the premises of plaintiff's intestate, and maintained the same for five years without objection. Meanwhile the intestate sold the premises, and accepted the price they brought in that condition, reserving his claim against the company. *Held,* that his right to obtain compensation for the injury to his premises under sec. 1852, Stats. 1898, had become irrevocable, and was not defeated by the act of the railroad company in removing all parts of its embankment from the limits of said premises.
2. In a proceeding by a landowner to recover compensation for land over which a railroad had constructed its road without having acquired title, the allegations of the petition are to be liberally construed, so far as is consistent with reasonably certainty of information. So construed, a petition, alleging the construction of defendant's track over an ascertainable parcel of land belonging to plaintiff, to which was annexed a plat specifying courses and distances with reference to duly defined and recorded lot lines, is sufficient to confer jurisdiction upon the court to ascertain and adjudge what land, within the limits of that described, had in fact been occupied by defendant's construction.
3. Although sec. 1852, Stats. 1898, requires proceedings thereunder to comply generally with the provisions relating to condemnation of land by railroad corporations, a landowner, seeking under that section to recover compensation for land already taken, need not allege or prove the necessity of the taking, required by sec. 1846 in condemnation proceedings initiated by a railroad company.

APPEAL from a judgment of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Affirmed.*

The defendant in 1890 built a spur track entirely on its own land, which bounded a lot of the plaintiff's decedent on the north and on the east. In grading for said track,

the fill or embankment extended over a triangle in the northeast corner of decedent's lot sixteen feet long east and west by eight feet north and south; and the track was so close to his corner that, in passing around the curve rapidly, cars might swing so that the eaves might overhang the northeast corner of the decedent's premises slightly. In 1895 the plaintiff's decedent, having meanwhile sold his lot, reserving his claim against defendant, filed a petition, under sec. 1852, R. S. 1878, alleging his ownership of a described lot, and the construction and operation of a spur track over and across the same "thirty feet wide on each side of its center line, as shown by the map attached to its petition on file;" no other description of lands occupied by the defendant being given. After trial the court amended or corrected the petition *nunc pro tunc* by permitting to be attached thereto a map showing the location of the defendant's track with reference to the decedent's lot lines, the limit of the thirty-foot space mentioned in the petition, and also a line marked, "Foot of Grade," with figures to indicate the dimensions of the portion of decedent's lot occupied thereby. Defendant answered, denying that it had constructed its track upon any land of the petitioner, denying that it had taken or claimed any portion of his land, or any right or interest therein, and, before the hearing for the appointment of commissioners, removed its track a few inches, so as to exclude the possibility of the eaves at any time overhanging decedent's lot line, and removed from within the limits of decedent's lot all parts of its embankment, and all earth and gravel cast thereon, so that at the time of the hearing no part of the embankment or roadbed of the defendant was upon the lot in question. The court found these facts substantially as above stated, and, as conclusions of law, that there had been an actual taking of a portion of the petitioner's lot, consisting of a right-angle triangle, extending from the northeast corner of said lot on the east line thereof south

for a distance of eight feet, and extending west on the north line of said lot a distance of sixteen feet, the hypotenuse of said triangle being a right line between the limits of said points at the south and west lines of said lots, respectively, and appointed commissioners, who made an award, from which the defendant appealed to the circuit court, and on that appeal judgment was entered in favor of said petitioner for $250 damages, and $115 costs and expenses of the proceeding. The judgment recites that the defendant, before trial in the circuit court, moved to dismiss the proceedings for want of jurisdiction, and in consequence of alleged defects in the petition. From the judgment so entered the defendant appeals to this court.

For the appellant there was a brief by *Fish, Carey, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *John T. Fish.*

For the respondent there was a brief by *Edward S. Bragg*, and oral argument by *John I. Thompson.*

DODGE, J. By a long line of decisions, commencing with an intimation in *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, collected and cited in *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309, and followed in *Hoge v. C., M. & St. P. R. Co.* 98 Wis. 302, and *Kuhl v. C. & N. W. R. Co.* 101 Wis. 54, the force and effect of sec. 1852, Stats. 1898, has become fully established, to the extent that construction of its track by a railway company over the land of another, when consented to, either expressly or by tacit acquiescence, irrevocably transfers from the owner to the company the permanent right of occupation for operating purposes, leaving to the former owner only the right to obtain compensation in the manner specified in that section. Under this construction, railroad companies have enjoyed immunity from harassment by actions in ejectment or for trespass, and from suits for injunction, and have been relieved from all liability, after

six years from the time of the construction of the track. With such immunity they must accept the liability which the statute imposes, namely, that of compensating the former owner for the injury resulting from the taking away of the rights so vested in the railroad company. The conclusions reached in these authorities are in no wise in conflict with the rule of law urged by appellant's counsel, and sustained by numerous citations, commencing with *Driver v. W. U. R. Co.* 32 Wis. 569,—that a railway company, having instituted condemnation proceedings, may discontinue them. That rule rests on the right of any litigant originating a suit to terminate it when no interests or rights will be impaired by such termination. *Manitowoc & L. W. R. Co. v. Stolze*, 101 Wis. 93; *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226; *Chicago, St. L. & W. R. Co. v. Gates*, 120 Ill. 86. The rule adopted under sec. 1852 is predicated upon the completed act of construction done by the railroad company and acquiesced in by the owner, while the rule of the *Driver Case* is predicated upon the incompleteness of the proceeding, so that rights have not already vested.

This court has been prompt to hold the landowner irrevocably bound by silence, sometimes for a very short period. Thus, in *Buchner v. C., M. & N. W. R. Co., supra*, the protest of the landowner came only about a month after the act of the railroad company in constructing its track; but he was held to be already deprived of his rights in the real estate, and of all his rights of action, except that for compensation under the statute.

The only exception or limitation of the rule of the line of cases above referred to is presented in *Morris v. W. M. R. Co.* 82 Wis. 541, where it was held that the circumstances might so entirely refute the purpose to construct the track over the premises of another, and might so fully show that a slight invasion of his premises was by mistake, that, if promptly remedied, the inference of a completed transfer

of the right need not arise, but it might be treated as a mere trespass. That principle is not, and need not be, at all questioned in reaching the decision in this case, which presents facts and circumstances so radically different as not to involve it. Here the construction of appellant's track extended some eight feet in one direction and sixteen in another, onto respondent's premises. It had remained there for a period of five years, with no suggestion that even the original construction was done under any mistake; and meanwhile the lot owner had acted, as he had a right to do, on the assumption that the railroad company had constructed its road, intending the legal results. He had sold his premises with that burden upon them, and accepted the price which they would bring in that condition. His injury from the construction is irrevocable. It cannot be adequately compensated in trespass, ejectment, or by injunction. Nor is he relieved from that injury by the act of the appellant in now withdrawing its tracks from his premises. That results in benefit to his grantee, but does not enable him to recover from that grantee the reduction in price in all probability accorded by reason of the existence of this burden upon the premises. Surely, maintenance of its track by the railroad company for five years, without protest from the lot owner, brings the present case fully within the rule of *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309, and *Kuhl v. C. & N. W. R. Co.* 101 Wis. 54; and especially must the situation have become irrevocable where the lot owner has, as in the present case, materially changed his position in reliance upon it. It is not necessary in this case to decide at what moment the transfer of rights becomes irrevocable, so that the real-estate rights have passed to the company, and the statutory cause of action in implied or *quasi*-contract is all that remains to the landowner. What we do hold is that the lapse of five years, accompanied by such change of situation as in fairness and equity should work an estoppel, attains that result.

Appellant challenges jurisdiction for certain alleged defects in the petition: first, in that the description of the land occupied by it is insufficient; and, secondly, in that the necessity of the taking is not alleged. As to the first objection, we deem the petition sufficient to inform appellant that petitioner claimed that it had constructed its track over an ascertainable parcel of land belonging to him, which included that found by the court to have been so taken and occupied. The plat forms a part of the petition, and thereon are specified courses and distances, with reference to the duly defined and recorded lot lines. Under our statutes (secs. 2668, 2669, 2829, 2830, Stats. 1898), the allegations of the petition are to be treated, not with the technical nicety of an indictment at common law, but with favorable intendment, so far as consistent with reasonable certainty of information to the opposite party and to the court. So treated, this petition is sufficient at least to confer jurisdiction upon the court to ascertain and adjudge what land, within the limits of that described, has in fact been occupied by the appellant's construction.

The second objection has, in effect, already been overruled by this court, in *Chicago, M. & St. P. R. Co. v. Richardson*, 86 Wis. 154. The proceeding under sec. 1852, while required to comply generally with that under sec. 1846, must of necessity differ therefrom, and be relieved from some of the requirements thereof by reason of the different situation,— especially so when the petition emanates from the property owner seeking redress for acts already done by the railway company. It would be incongruous to permit the latter to deny necessity of its taking, or to insist on allegation or proof by the other party, when the whole proceeding rests on its own acts, affirming such necessity in the most unambiguous manner.

By the Court.— Judgment affirmed.

107 286
117 *145

EVANS, Appellant, vs. RECTOR and another, Garnishees, Respondents.

May 18 — June 21, 1900.

Garnishment: Filing of pleadings: Trustees: Liability as garnishees: Contingent interest: "In custodia legis."

1. Plaintiff moved to strike out the answers of garnishees, upon which he had elected to take issue, for the reason that they had not been properly filed as required by sec. 2664, Stats. 1898 (prescribing that pleadings shall be filed before the commencement of the first term of court, after their service, in which the action is noticed for trial). On the hearing of such motion it appeared that the answers had been filed on the first day of the first term after the action had been duly noticed for trial. *Held* that, in the absence of anything in the record to indicate that such answers were not filed before the opening of court on that day, and in view of the court's order on such motion that they be permitted to stand and a finding that the action duly came on to be heard, there was no error in refusing the motion.
2. By the terms of a will G. was given a sum of money, but in case ten years should elapse without advices as to his existence the sum was to be divided between R. and A., who were appointed trustees of the fund by the proper county court, required to account therefor to such court, and gave bonds for the faithful performance of the trust. No advices having been received from G. for about six years, plaintiffs brought suit against G. and garnished R. and A. *Held*, that G. had no vested interest in or absolute right to the fund at the time of the service of the garnishee process, and that, under sec. 2768, Stats. 1898 (providing that a garnishee shall not be liable as such for property in his possession, unless the right of the principal defendant thereto was absolute at the time of the service of the garnishee process), the garnishees were not liable.
3. Under a will, a sum of money was given to G., but to go to R. and A. in case no advices of G.'s existence should be received within ten years, and R. and A. were duly appointed trustees thereof by the proper county court, and gave bonds to such court for the faithful execution of the trust as directed by the court. *Held*, that such fund is in the custody of the law and under the control of the court, and cannot be reached by garnishment of such trustees.

APPEAL from a judgment of the county court of Fond du Lac county: A. E. RICHTER, Judge. *Affirmed.*

For the appellant the cause was submitted on the briefs of *E. Blewett.*

For the respondents there was a brief by *Giffin & Sutherland,* and oral argument by *D. D. Sutherland.*

CASSODAY, C. J. This action was commenced in the county court November 22, 1898, to recover a balance of $95.92 due upon a promissory note executed by the principal defendant, Elmer D. Griswold, March 24, 1891, and the defendants *Marcella E. Rector* and *Almeda E. Atkins,* as trustees of Elmer D. Griswold, were garnished. The officer having returned his inability to make service of the summons on the defendant Elmer D. Griswold, for the reason that he could not be found, nor his whereabouts ascertained, service thereof was made in form upon him by publication.

The garnishees answered to the effect: That they were the trustees of the defendant Elmer D. Griswold. That their father died September 2, 1895, leaving a last will and testament, which was admitted to probate November 5, 1895. That the third clause of the will read as follows: "To my beloved son Elmer D. Griswold I give and bequeath one hundred dollars, he having already received at least thirteen hundred dollars more of my estate than either of my daughters. As I have not seen nor heard from my son Elmer for several years last past, should a period of ten years elapse without advices as to his existence, then the one hundred dollars aforesaid, intended for my son Elmer, shall be equally divided between my two daughters, *Marcella E. Rector* and *Almeda E. Atkins.*" That October 16, 1896, the county court made an order in the matter of such estate in effect reciting the clause of the will quoted, and that the estate was about to be closed up and settled, and for the purpose of closing and settling the same it was therein ordered that

Marcella E. Rector and *Almeda E. Atkins* be, and they were thereby, "nominated as trustees of said legacy of $100," and such trustees were thereby ordered to file a bond for the faithful execution of such trust, as therein directed; that, if Elmer D. Griswold should be found within the period of ten years from the date of the admission of such will to probate, then such trustees pay over to him the $100 so held in trust, but that, if he should not be found within that period, then such trustees divide the same between themselves, and make due report thereof to the court; that upon the filing of such bond letters of trust should be issued. That such bond was thereupon filed, and such letters of trust issued. That the whereabouts or existence of Elmer D. Griswold was unknown. That the ten years had not elapsed. That such trustees held such $100 in trust as aforesaid. That neither they nor either of them was indebted to him, nor had in her or their possession any property belonging to him, or in which he had any interest.

The plaintiff thereupon elected to take issue, and did take issue, with such answers, and each of them. The issues thus formed between the garnishees and the plaintiff were tried by the court, and at the close of the trial the court, on July 10, 1899, found, in effect, the facts as stated, and that for six years prior to that time the whereabouts of Elmer D. Griswold were unknown to such trustees, or either of them, or any one, and that during that time nothing had been learned, and no advices had been received, of his existence; and as conclusions of law the court found that such garnishees were not liable. From the judgment entered thereon accordingly the plaintiff brings this appeal.

Error is assigned because the court refused to strike out the answers of the garnishees. It appears from the record that the garnishees, respectively, served their answers December 9, 1898; that on the same day the plaintiff served his election to take issue with such answers, and the same

was filed January 10, 1899; that April 15, 1899, the plaintiff served on the attorneys for the garnishees notice for taking the depositions of two witnesses, April 27, 1899, at Tracy, in Lyons county, Minnesota; that April 26, 1899, the plaintiff served notice of the trial of the action on the attorneys for the garnishees; that April 27, 1899, such depositions were taken; that the term of the court commenced May 8, 1899. At the commencement of that term of the court, counsel for the plaintiff moved to strike out the answers of the garnishees, for the reason that they had "not been properly filed, as required by statute." At the same time counsel for the garnishees stated that their answers had been filed on that day, and asked that such filing be permitted to stand, and such request was then and there granted. There is nothing in the record to indicate that such answers were not filed before the opening of the court on that day, and hence "before the commencement of the first term" of the court after their "service at which the action" was "noticed for trial," as prescribed by the statute (sec. 2664, Stats. 1898). With the recital in the findings that "the issues arising from the election to take issue upon the answers of the garnishees, which were made and filed to the affidavit for garnishment in such action, having duly come on to be heard before the court upon notice of trial duly served by the plaintiff," and after the action taken by the plaintiff, as stated, we cannot hold that there was any error in refusing to strike out such answers.

It requires no argument to show that the ruling of the trial court may properly be sustained. Our statute fixes and limits the liability of the garnishee. Sec. 2768, Stats. 1898. Under that statute this court has repeatedly held that "a garnishee is not liable as such for property in his possession unless the right of the principal defendant thereto is *absolute* at the time of the service of the garnishee process, nor for the amount of a debt if its becoming due de-

pends upon a contingency." *Edwards v. Roepke*, 74 Wis. 571; *Spitz v. Tripp*, 86 Wis. 25; *Vollmer v. C. & N. W. R. Co.* 86 Wis. 305; *Gore v. Brucker*, 94 Wis. 68. The principal defendant, *Elmer D. Griswold*, had no vested interest in, nor absolute right to, the $100 at the time of the service of the garnishee process. On the contrary, and under the clause of the will quoted, he had no right to it, and never will have any right to it, unless within a period of ten years from the probate of the will his existence shall become known. If no advices as to his existence shall be received during that time, then the $100 is to become the absolute property of the two garnishees. As indicated, the garnishees were appointed trustees by the trial court for the very purpose of holding such fund until the determination of such contingency. They have given bond for the faithful execution of the trust as directed by the court. They are required to report to the court, and are answerable to the court, and can only be discharged from such liability by the court. The fund is in the custody of the law, and under the control of the court. Manifestly, such fund, in the hands of such trustees, cannot be reached by garnishment. *J. I. Case T. M. Co. v. Miracle*, 54 Wis. 295; *Blum v. Van Vechten*, 92 Wis. 378; *Bowden v. Schatzell*, 1 Bailey, Eq. 360, 23 Am. Dec. 170; *Marvin v. Hawley*, 9 Mo. 378, 43 Am. Dec. 547; *Bulkley v. Eckert*, 3 Pa. St. 368, 45 Am. Dec. 650; *First Nat. Bank v. Dunn*, 97 N. Y. 149. There is no reason for questioning the validity of the trust.

By the Court.—The judgment of the county court of Fond du Lac county is affirmed.

SULLIVAN, Appellant, vs. COLLINS, imp., Respondent.

May 18 — June 21, 1900.

107 291
[6]108 302
107 291
109 312
107 291
111 [3]330
107 291
114 [4]597

Pleading: Amendment on trial: Statute of limitations: Abuse of discretion: Evidence: Cross-examination: Trials: Insinuations by counsel against character of witness: Instructions to jury: Motive in bringing action.

1. Under sec. 2830, Stats. 1898 (granting power to courts to allow amendments to pleadings, upon the trial, in furtherance of justice and upon such terms as may be just), it is an abuse of discretion to allow the statute of limitations to be set up, by an amendment upon the trial, without any showing to excuse the delay, and without the imposition of any terms or conditions. Such a ruling is not "in furtherance of justice."
2. Where, in an action for amounts due for rent and for a suit of clothes, the plaintiff was examined simply as to the sale of the clothes, upon cross-examination it is error to allow, against objection, questions as to the receiving of checks by the plaintiff from the defendant at dates before the alleged sale.
3. An affirmative defense of payment cannot be proven by cross-examination of a party when he has given no testimony as to the claim which is alleged to have been paid. Language used in *Weadock v. Kennedy*, 80 Wis. 449, to the effect that a party may always be cross-examined on the whole case whenever he has testified as to any fact in the case, criticised, and *held* not to imply intention to depart from the rule that the cross-examination of a witness should be confined to matters brought out on the direct examination.
4. While it is competent to show by cross-examination of one party that there was ill feeling between himself and the other, or that trouble had occurred between them, and the general character of the trouble, it is not competent for counsel to inject into the case, by statement and insinuation, charges of lying, theft, and perjury against the party undergoing cross-examination; and in case he does so the trial court distinctly fails in its duty unless it calls him to order at the outset and stops the objectionable remarks: the mere sustaining of objections, without fitting rebuke, is no adequate remedy for the evil.
5. In an action on contract, where plaintiff's claim was old and subject to the criticism that it was stale, but there was enough testimony in its support to entitle it to be fairly submitted to the jury, an instruction that, if the action was merely an attempt to

defraud, hinder, and oppress the defendant, the jury should find for the defendant, is *held* not justified by the evidence and distinctly misleading.

6. Such an instruction, if proper in any case, should not be given without a sufficient qualification to inform the jury that, if the plaintiff has proven his cause of action, he should recover notwithstanding his motive in bringing the action was to oppress the defendant.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an action commenced November 24, 1897, to recover the sum of $912, and interest, alleged to be due for the rent of a store from May 14, 1891, to April 8, 1893, and also the sum of $70 alleged to be due for an overcoat and a suit of clothes delivered to one Gordon at the request of the defendants. The defendant M. V. Sullivan is a brother of the plaintiff, *John E. Sullivan*, and made default in the action. The defendant *M. L. Collins* answered, admitting the leasing of the store, and claiming that the rent had been paid, and denying any knowledge and information sufficient to form a belief as to the truth of the allegations forming the second cause of action. At the opening of the trial the court permitted the defendant to amend his answer without terms by pleading the statute of limitations as to that part of the rent which accrued prior to November 14, 1891. The evidence on the trial showed that the plaintiff prior to 1891 was, and continued to be thereafter, a merchant tailor in the city of Fond du Lac; that the defendants M. V. Sullivan and *M. L. Collins* were on the 14th of May, 1891, and continued up to the 8th of April, 1893, to be, copartners engaged in a gentlemen's furnishing business in the same city; and that during the time from May 14, 1891, to April 8, 1893, the defendants, as copartners, rented of the plaintiff one half of the store occupied by the plaintiff, at a rental of $40 per month. The claim of the defendant *Collins* was that this rent was paid. The jury rendered a verdict for the defend-

ants, on which judgment was entered, and the plaintiff appeals.

For the appellant there was a brief by *Giffin & Sutherland*, and oral argument by *D. D. Sutherland.*

For the respondent there was a brief by *Edward S. Bragg*, of counsel, and oral argument by *John I. Thompson.*

WINSLOW, J. 1. Upon the opening of the trial of the case, the court, upon oral application of the defendant, without any fact being shown to excuse the delay, and without imposing terms, allowed an amendment to the answer setting up the statute of limitations as to the six months' rent which accrued between May 14 and November 14, 1891.

The statute allowing amendments upon the trial is a broad and sweeping one, and is in very frequent use in the trial courts. It gives the trial court full power to allow amendments of the pleadings upon the trial "in furtherance of justice and upon such terms as may be just." Stats. 1898, sec. 2830. The matter is left to the sound discretion of the trial court to decide whether the proposed amendment is in furtherance of justice, and, if so, upon what condition the amendment is to be granted. With this discretion this court will not interfere, except in cases of abuse thereof. *Illinois S. Co. v. Budzisz*, 106 Wis. 499. The rule has long been established in this court that there is a substantial difference between such defenses as usury and the statute of limitations and other ordinary defenses, especially when application is made to the court for favor or indulgence by way of amendment. *Morgan v. Bishop*, 61 Wis. 407, and cases cited. While the court has the same power to allow amendments setting up such defenses, the question whether such an amendment, setting up what is considered a hard and unconscionable defense and savors of a harsh penalty, is in fact in furtherance of justice, is necessarily a very different question from that which arises when application is made

to insert some minor allegation in a pleading, or set up a defense which goes to the merits of the case. It is believed that the cases are extremely rare where it would not be an abuse of discretion to allow such an amendment to be made upon the trial of the case without any showing to excuse the delay, and without imposing some terms or condition. The nearest approach to such a case, perhaps, is that of *Illinois S. Co. v. Budzisz, supra;* but in that there was a showing of facts tending to excuse the delay, and, furthermore, the only objection made was that of want of power in the court to permit the amendment, and it was held that this amounted to a waiver of other objections. In the present case, however, in addition to the failure to show any reason for the delay, there was an express claim by the plaintiff that terms should be imposed. Under the repeated ruling of this court cited in the case of *Morgan v. Bishop, supra,* we are compelled to hold that it was an abuse of discretion to allow the statute of limitations to be set up by amendment upon the trial without any showing to excuse the delay, and without the imposition of any terms or conditions. Such a ruling cannot be considered as "in furtherance of justice."

2. Upon the opening of the case the plaintiff was called as a witness, and examined simply as to the alleged sale of the overcoat and suit of clothes by him to one Gordon, upon the promise of the defendants to pay for the same. Upon cross-examination the defendant's attorney proceeded to ask him numerous questions as to the receiving of checks by the plaintiff from the defendant in August and September, 1891, before the alleged sale of the clothes, and also in the year 1892. These questions were properly objected to as not proper cross-examination, but the objections were overruled. It is plain that the cross-examination did not relate to any matter gone into on the direct examination, but related to the affirmative defense of payment of the rent, and the

plaintiff had not been examined as to that cause of action at all. The rule is well known that the cross-examination of a witness should be confined to matters brought out on the direct examination. *Norris v. Cargill*, 57 Wis. 251; *Lueck v. Heisler*, 87 Wis. 644. It is also true that in the discretion of the court a broader range of cross-examination should be allowed in the case of a witness who is also a party. 3 Jones, Ev. § 844. This latter rule is most frequently applied in cases of alleged fraudulent transfer of property where the party has been examined in chief as to his ownership of the property in dispute. In such cases the circumstances of the transfer may be fully gone into as cross-examination. *Kalk v. Fielding*, 50 Wis. 339; *Weadock v. Kennedy*, 80 Wis. 449. Language was used in the last-named case indicating that a party may be always cross-examined on the whole case whenever he has testified as to any fact in the case, but the case did not involve that question, and certainly there was no intention to depart from the well-established rules above cited. Certainly, an affirmative defense of payment cannot be proven by cross-examination when the party has not given any testimony as to the claim which is alleged to have been paid. Under the circumstances, we think the allowance of these questions, against objection properly taken, was error.

3. Upon the cross-examination of the plaintiff, the defendant's counsel asked the plaintiff if there had not been trouble between himself and the defendant, and the plaintiff denied that there had been any trouble. Thereupon the following proceedings took place: "*Q.* You were a witness, were you not, in the case of the state against M. V. Sullivan, charged with larceny in that store from *M. L. Collins?* (Objected to as incompetent and immaterial, and not cross-examination.) *The Court:* What is the object, General? *Gen. Bragg:* I don't care to tell the witness the object. I think the question is proper. We will find before we get through with

the case that it turns entirely upon the question of credibility; necessary to show the surroundings of all the parties to this deal. *Mr. Sutherland:* The only question that is before us, so far as the witness has testified, is the question as to whether these goods were delivered to Gordon at the request of M. V. Sullivan and *M. L. Collins*, and if they agreed to pay for them. This is the only question. That occurred in 1891 and 1892. Now, what are we going to try? *Gen. Bragg:* The witness that swears to that we say lies. In order to sustain our proof of this falsehood which will be testified to by the defendant, we seek to prove his temperament and condition and relation to his brother thief, who has defaulted here for his benefit. *Mr. Sutherland:* I would like that to be taken down, and object to such an argument being made. *Court:* You may finish your statement. (Plaintiff excepted.) *Gen. Bragg:* To show the combination, conspiracy, joint interest of the two to break down the character and credit of the hostile establishment, growing out of the identical litigation. *Mr. Sutherland:* Now, I renew the objection to such argument being made in the presence of the jury, and ask the court's ruling upon it. *The Court:* Of course, at this stage of the case I am unable to perceive anything that would justify one expression used by counsel. *Gen. Bragg:* What is that? *The Court:* I don't want to repeat it. I don't know what the evidence may develop later on. *Gen. Bragg:* I didn't use that term with reference to this witness. *The Court:* Coupled with it, whether you intended it or not, was another word, as I understood, that perhaps you didn't intend to use. The word 'brother' was coupled with some other word. *Gen. Bragg:* That is his brother; his brother. *The Court:* Yes, I know; and the inference that I drew from it was that it was applicable to both. *Gen. Bragg:* No, not at this stage of the game. *The Court:* I will sustain the objection to this question now. *Q.* Your brother Michael V. was in-

dicted, was he not,—I don't know but what I shall make another offensive remark,— upon the certificate of my friend Sutherland here, as court commissioner, acting judicially upon the evidence? (Objected to as incompetent, immaterial, and not proper cross-examination. Objection sustained. Defendant excepted.) *Q.* Your brother was indicted, wasn't he? (Objected to as before.) *The Court:* If the brother was a witness, you can prove it either by the record or by him; and until he is a witness can you do this? *Gen. Bragg:* Yes, in order to show motive, interest, feeling, or prejudice, by showing that upon that issue in that store this witness interposed his evidence to attempt to overthrow the evidence which settled the question of guilt, denied and contradicted the testimony of the witness, and the jury found a verdict of guilty. This man was made a party in it in covering the brother on what he was charged. (Objected to by the plaintiff.) *Q.* You were a witness upon that indictment in support of his case? (Objected to as not cross-examination, and involving two questions. Objection sustained. Defendant excepted.) *Q.* Were you not a witness for the defendant Michael V. Sullivan upon an indictment against him for larceny of goods of *M. L. Collins* from the store building occupied by you and by M. V. Sullivan when he was acting in your employ as your clerk? (Objected to as incompetent, immaterial, and not cross-examination. Objection sustained. Defendant excepted.) *Gen. Bragg:* I offer it to lay the foundation for what I shall argue with reference to the credibility of this witness; upon his interest and bias and passion. (Objection sustained. Defendant excepted.) *Q.* Did you not upon the trial of the indictment found against M. V. Sullivan for larceny from *M. L. Collins*, in the same store building occupied by you, and while he was your clerk, having access to that store, testify as a witness on his behalf contradicting the statements and evidence of *M. L. Collins* of conversations had with you pointing out

to you goods which had been so stolen, and which he testified you had promised to have adjusted, and did you not deny his statements *in toto?* (Objected to as incompetent and immaterial, and not proper cross-examination. Objection sustained. Defendant excepted.) *Q.* Were you not present in the store occupied by you when *M. L. Collins* attempted to take possession of the property alleged purchased with your knowledge by him from M. V. Sullivan, and did you not then countenance and permit Tom Cale to stand as guard at your door to prevent *Collins* from taking his goods, and threatening him with personal violence if he attempted to do so? (Objected to as incompetent, immaterial, and not cross-examination. Objection sustained. Defendant excepted.)"

It was entirely competent to show by cross-examination that there was ill feeling between the plaintiff and defendant, or that trouble had occurred between them, and the general character of the trouble; but it was not competent for counsel to inject into the case, by statement or insinuation, charges of lying, theft, and perjury, such as these. Cases are not so tried, at least in countries which found their jurisprudence upon the English common law. This court has had occasion to condemn such a manner of trying cases. *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157. Nor ought it to remain for this court upon appeal to condemn such tactics. The trial court should at the outset have decisively called counsel to order, and stopped such remarks, and it distinctly fails in its duty when it does not do so at once and effectively. The mere sustaining of objections, without fitting rebuke, is no adequate remedy for the evil. The least that a self-respecting court can do under such circumstances is to stop such practice in the presence of the jury, and not allow it to proceed with simply a perfunctory sustaining of objections. When counsel thus throws into the case such charges and insinuations, with the added weight

of his own character and prestige, he does that which no lawyer should do. He tries his case upon unsworn statements and vilification, instead of evidence, and he obtains a verdict, if at all, based, in part at least, upon that which is not evidence, and which has no proper place in the trial.

4. The court, among other things, charged the jury as follows, and exception was duly taken to the instruction: "If the jury finds from the evidence that this action is merely an attempt to defraud, hinder, and oppress the defendant *Collins*, they will find for the defendant." We have been unable to find in the case, either in the way of evidence or lack of evidence, anything which would justify the giving of this instruction. While the plaintiff's claim was old, and subject to the criticism that it was stale, still there was certainly enough testimony in its support to entitle it to be fairly submitted to the jury for decision without the implication contained in this instruction. The propriety of such an instruction in any case may well be doubted. What the jury would understand by it is certainly questionable. It may well be that some jurymen would understand that, even if the plaintiff had a valid claim against the defendant, still, if his only object in bringing the action was to hinder and oppress the defendant, and otherwise the action would not have been brought, the plaintiff could not recover. This is not the law. The motive of the plaintiff cuts no figure, if he is doing a lawful act (*Metzger v. Hochrein*, *ante*, p. 267), and the bringing of an action upon a valid claim is an entirely lawful act. So the test is, Did the plaintiff prove his cause of action? If he did, he should recover, whatever his motive; and, if he did not, he should not recover, not because his motive was bad, but because he did not prove his case. We regard the instruction as it stands as not justified by the evidence, and also as distinctly misleading. If it were to be given in any case, there should be added to it a sufficient qualification which would inform the jury that, if

the plaintiff had proven his cause of action, he could recover, notwithstanding his motive in bringing the action was to oppress the defendant.

There are other errors alleged, but it is believed that what has been said furnishes a sufficient guide for the retrial of the case. It is not a difficult or complicated case. The issues are simple, and call only for the application of well-established rules.

By the Court.—Judgment reversed, and action remanded for a new trial.

THE STATE VS. SAWELL.

May 18—June 21, 1900.

Courts: Jurisdiction: Statutes: Repeal: Revival.

Ch. 112, Laws of 1893, creating the municipal court of Douglas county, conferred on such court exclusive jurisdiction in misdemeanors, and suspended the jurisdiction of the circuit and superior courts of that county in such minor offenses. Ch. 33, Laws of 1893, gave the superior court jurisdiction concurrent with the circuit court in prosecutions for misdemeanors. By ch. 278, Laws of 1895, such exclusive character of the jurisdiction of the municipal court was taken away. *Held* that, since ch. 112, Laws of 1893, did not repeal ch. 33, Laws of 1893, but merely suspended it, it was not a repealing act within the meaning of sec. 4973, Stats. 1898 (providing that no act or part of an act repealed by a subsequent act of the legislature shall be deemed to be revived by the repeal of a repealing act), and therefore the removal of the suspension by ch. 278, Laws of 1895, left ch. 33, Laws of 1893 in full force and restored the jurisdiction of the superior court.

REPORTED from the superior court of Douglas county: CHARLES SMITH, Judge. *First question answered in the negative, the others in the affirmative.*

Questions of law reported for solution pursuant to sec. 4721, Stats. 1898. The defendant was arrested on a war-

rant issued by the county judge of Douglas county, Wisconsin, charged with a misdemeanor. A preliminary examination was held, resulting in the accused being held for trial before the superior court of such county. Thereafter an information was duly filed, following the charge contained in the complaint, upon which the defendant was arraigned before the superior court, and to which he then entered a plea in abatement upon the ground that the county judge had no jurisdiction to issue the warrant for his arrest or to take any proceedings pursuant thereto; and that the only court having jurisdiction in such cases in Douglas county is the municipal court thereof. The plea was overruled, whereupon the defendant entered a plea of guilty, and by his counsel requested the submission of the following questions to this court for decision: (1) Is exclusive jurisdiction to hear, try, and determine cases of misdemeanor arising in Douglas county, Wisconsin, vested in the municipal court thereof? (2) Has the county judge of Douglas county jurisdiction to issue warrants and hold preliminary examinations in cases of persons charged with misdemeanors, and power to hold such persons to trial in the superior court of Douglas county? (3) Has the superior court jurisdiction to render judgment against the defendant in this case?

For the plaintiff there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

For the defendant the cause was submitted on the brief of *C. R. Fridley* and *W. R. Foley*.

MARSHALL, J. By the law creating the superior court of Douglas county (ch. 33, Laws of 1893), jurisdiction concurrent with the circuit court was conferred upon it in prosecutions for misdemeanors. The jurisdiction of the circuit court, and of the superior court, as to such minor offenses, was suspended by ch. 112, Laws of 1893, conferring upon

the municipal court of Douglas county exclusive jurisdiction in such matters. By ch. 278, Laws of 1895, such exclusive character of the jurisdiction of the municipal court was taken away, leaving its jurisdiction, in cases of misdemeanor, by the literal sense of the words used in the law, concurrent, merely, with that of the circuit and superior courts.

The question is, Did the mere change of the law regarding the jurisdiction of the municipal court, by implication, restore the jurisdiction of the superior court, so far as theretofore disturbed by the municipal court act? That must be answered in the affirmative. True, we have the following statutory rule for determining the effect of a repeal of a repealing act: "No act or part of an act repealed by a subsequent act of the legislature shall be deemed to be revived by the repeal of such repealing act." Sec. 4973, Stats. 1898. But that is contrary to the common-law rule (Maxwell, Interp. Stats. [3d ed.], 585), and was early in the history of this court construed as applying only to cases strictly within its provisions,— cases of strict repeal,— not to a mere modification of a general law by ingrafting on it an exception covering some particular case or class of cases. In such circumstances it was held that the first act was not repealed within the meaning of the statutory rule of construction, but merely in part suspended, and that a repeal of the legislation creating the suspension removes it, leaving the law in force in its full scope. *Smith v. Hoyt*, 14 Wis. 252. That rules the question under discussion. The act conferring exclusive jurisdiction, in cases of misdemeanor, upon the municipal court of Douglas county, did not repeal the law conferring jurisdiction in like cases upon the superior court, but merely suspended and superseded it. It was not a repealing act and not within sec. 4973. Therefore, by the common-law rule, the removal of the suspension left the superior court act in full force, according to the literal sense thereof.

What has been said in effect answers the first question in the negative, and the other questions reported for decision in the affirmative. No further discussion of the matter presented seems to be necessary. The entire subject covered by the three questions might have been covered by the single question of whether the superior court of Douglas county has jurisdiction to try cases of misdemeanor. That being answered in the affirmative, necessarily the jurisdiction of the county judge to hold preliminary examinations in criminal cases is unaffected by the municipal court act, and the superior court has jurisdiction to pass sentence on the defendant in this case.

By the Court.— The first question reported is answered in the negative and the others in the affirmative, and the case is remanded for further proceedings according to law.

CASES DETERMINED

AT THE

August Term, 1900.

RENNE, by guardian *ad litem*, Respondent, vs. THE UNITED STATES LEATHER COMPANY, Appellant. 107 305 107 222 107 263

April 10 — September 25, 1900.

Master and servant: Personal injuries: Evidence: Negligence: Proximate cause: Instructions to jury: Assumption of risk: "Precise danger:" Verdict: Contributory negligence: Excessive damages.

1. In an action to recover for personal injuries sustained by a sixteen-year-old boy while in the defendant's employ, it appeared, among other things, that at defendant's plant a side track, separating two of its buildings, was crossed by a steam pipe which connected such buildings; that such steam pipe was three feet and ten inches above the top of an ordinary freight car, and two feet and nine inches above the top of the car in question, and that plaintiff, who was assisting defendant's engineer to switch a car to a point beyond the steam pipe, had climbed to the top of the car to set the brakes, when he was struck in the back by the steam pipe, knocked from the top of the car, and injured. *Held*, that it was not error to admit, against objection, evidence tending to prove that the steam pipe in question might, at small cost and without injury to its efficiency, have been raised so as not to interfere with employees riding on top of freight cars.
2. Where the evidence in such case was sufficient to support a finding of the jury to the effect that, by placing the steam pipe so near the top of such cars, the defendant made it unnecessarily hazardous for its employees riding on the tops of such cars, it was not error to submit to the jury, in the general charge, the questions whether the defendant was in the exercise of ordinary care in locating its steam pipe where it did, and, if negligent in that re-

gard, whether such negligence was the proximate cause of the injury.

3. Plaintiff had worked as an errand boy for defendant about six months before the injury complained of, and had helped defendant's engineer do the braking on cars switched to its buildings, but had never worked around machinery of any kind. The car upon which plaintiff was riding was being pushed rapidly up a grade and he had climbed on top to set the brakes when it reached a platform 120 feet beyond the pipe where the grade was still ascending. He had passed under said pipe, on box cars, eight or ten times before, on other tracks, which had no up grade, but never on the top of the cars, and had passed under the pipe on the track in question only two or three times, and then when going to points beyond the platform, where there was no up grade. His back was towards the pipe, and he did not think of it, though he knew it was there. He did not know how high above the ground or the cars the pipe was, or that the car on which he was riding was higher than an ordinary car, and had never been cautioned about the pipe, or the care to be used in going under it. *Held*, that the questions whether the plaintiff appreciated, or ought to have appreciated, the precise danger of riding upon the top of the car while passing under the pipe, and whether the plaintiff was guilty of contributory negligence, were for the jury.

4. In such case it was not error to charge the jury, that "you should not only consider that he knew the pipe was there, and that if he collided with it he would be injured, but you should inquire whether he appreciated, or ought to have appreciated, the *precise danger* — the relation of the pipe to the track, to the box car, and its distance from the box car, and the danger of passing under on such a car,"— the effect of the words "precise danger" being to call the attention of the jury to the particular danger of the plaintiff being knocked off the car by the pipe, as distinguished from dangers generally by reason of working in defendant's yards.

5. Nor was it error to instruct, in substance, that if the jury should find that the nearness of the pipe to the car was a danger to which plaintiff was exposed in the performance of his duty, and was a danger which was known and comprehended by him, or was so open or obvious that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable care, to have known it, then he assumed the risk.

6. In such a case there was evidence showing that plaintiff had received general instructions about switching and coupling cars, and defendant's engineer testified that he had warned him to

keep off from the tops of cars while in motion, which testimony was flatly contradicted by plaintiff. *Held*, that a finding that plaintiff had not been warned to keep off the tops of cars while passing under the pipe in question was supported by the evidence.

7. Plaintiff, a boy sixteen years of age, was injured so that amputation of one arm was necessary, and the other dislocated at the wrist and elbow and so broken and injured that its use was permanently impaired. He suffered much pain, though able to be about in four or five weeks after the injury. He received an injury to the head and had difficulty in passing urine, which might be due to some local cause or an injury to the spine or brain. Prior to the injury he was healthy and was receiving $1 per day. *Held*, that a verdict for $20,000 damages was largely in excess of what was warranted by the law and the evidence, and that a new trial should be granted unless plaintiff remitted all damages in excess of $12,000.

8. MARSHALL and BARDEEN, JJ., dissenting, are of the opinion that the evidence showed that the danger which menaced the plaintiff was so open and obvious, and so well known to him, that it should be said, as a matter of law, that he assumed the risk of accident.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *G. W. Cate* and *R. J. MacBride.*

For the respondent there was a brief by *Spencer M. Marsh*, attorney, and *Olin & Butler*, of counsel, and oral argument by *John M. Olin* and *Harry L. Butler.*

The following opinion was filed June 21, 1900:

CASSODAY, C. J. This action was commenced February 17, 1899, to recover damages for personal injuries sustained by the plaintiff October 8, 1897, while in the employ of the defendant, and riding upon the top of a freight car, for the purpose of setting the brake thereon, while being backed into its yards, by being swept from the top of the car by an exhaust pipe extending horizontally from its boiler house to its beam house, over its side track or tracks, and

thereby thrown down under the car and injured. The defendant answered by way of admission, denials, and counter allegations. Among other things, the answer admitted, in effect, that the defendant was a corporation duly organized and existing under and by virtue of the laws of New Jersey, having its principal office of business at New York; that at the times mentioned it operated a tannery in the city of Stanley, in Chippewa county, Wisconsin; that its plant consisted of several buildings, among which were two buildings located a considerable distance apart, and respectively known as the beam house and boiler house; that at a considerable distance from the two buildings, and easterly therefrom, were located the railway tracks of the Wisconsin Central Railway Company; that the defendant owned and operated side tracks extending from the Wisconsin Central Railway tracks to such plant; that one or more of the side tracks passed between the beam house and the boiler house; that the defendant also at the time owned and operated an engine, with which it propelled to its plant, over its side tracks, such cars of freights as might be shipped to it over the Wisconsin Central Railway; that during all the times mentioned the defendant maintained two steam or exhaust pipes, extending horizontally from the boiler house to the beam house, over such track or tracks, which passed between those buildings; that for a short time prior to October 8, 1897, the plaintiff was in the employ of the defendant at such plant as messenger or boy of all work, as should be required of him; that by reason of such employment it became and was the duty of the defendant to provide him a reasonably safe and suitable place in which to perform the duties required of him, and to warn him of any danger incident to the performance of such duties, and also not to expose him to unnecessary or unusual hazards; that October 8, 1897, the plaintiff climbed to the top of a car, then being moved upon such side tracks, and then

being moved over one of such side tracks, which passed between the beam house and the boiler house, by direction of the engineer of the defendant then in charge of such engine; that such car was pushed or kicked westerly by such engine, in charge of such engineer, and passed under the lower steam or exhaust pipe; that the plaintiff, being upon the top of the car, was knocked off the car, and between the car and the engine, and was run over by the engine, and by reason thereof sustained the injuries set forth in the complaint; that the car upon the top of which the plaintiff so climbed was of greater height than ordinary freight cars, but that cars of such height and of different heights were frequently handled by the defendant at its plant; that it had no knowledge or information whether the plaintiff had knowledge of the height of the car, or of the proximity of the lower pipe to the top thereof; that the plaintiff received the injuries complained of and set forth in the complaint by reason of being thrown or knocked from the top of the car as set forth in the complaint; that August 31, 1898, the plaintiff caused to be duly served upon the defendant a notice in writing of such injuries, etc., as required by the statute. And the answer alleged that all such injuries sustained by the plaintiff were suffered by him solely through and by means of the carelessness and negligence of the plaintiff, and not otherwise.

At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at $20,000. From the judgment entered thereon for that amount and costs, the defendant brings this appeal.

In addition to the facts thus admitted in the answer, it appears from the evidence, and is undisputed, that about 270 feet east of the exhaust pipe in question was the west end of the defendant's office, with the scales under the main track, just north of it; that thirty-nine feet west of the office was a switch to a side track coming from the west, along the north

side of the boiler house and the bark mill, into the main track; that twenty-six feet north of the office was the beam house running east as far as the office, if not further, and west to a point a few feet west of the exhaust pipe in question; that the beam house was north of all the tracks, and 321 feet in length; that a side track came in from the east, and ran along the southerly side of the beam house, toward the west, and into the main track, about 190 feet west of the office; that forty-eight feet east of the exhaust pipe was a switch, where the hide-house side track came from the west into the northerly side of the main track; that from the exhaust pipe west on the hide-house track, 120 feet, was a point opposite the center of the acid or chemical platform,—a platform twenty-seven feet long; that the grade from the west end of the scales or office to the hide-house switch ascended towards the west at the rate of about one foot in every 100 feet; that from that switch to the chemical platform it ascended at the rate of about two feet in every 100 feet. It is stated, in substance, by the defendant's attorneys that the freight car in question (No. 10,216), loaded with acids belonging to defendant, was on the Wisconsin Central tracks; that the defendant's railroad engineer, Payne, with the defendant's engine and the plaintiff, went after that car on the day of the accident, the plaintiff riding on the engine with the engineer; that when the car was reached the plaintiff got off from the engine and coupled the car to the engine, and then got onto the engine again; that the car was then taken to the scales, and the engine uncoupled from the west end of the car and recoupled to the east end of the car; that it was then pushed to the place of unloading at the chemical platform; that the hide-house switch, forty-eight feet east of the exhaust pipe mentioned, was opened by the plaintiff to let the car and engine out from the main track onto the hide-house track; that the plaintiff knew that the car was to be pushed

by the engine onto that track and under the exhaust pipe to the chemical platform, to be there unloaded; that after opening the hide-house switch, and when the car started to go upon the hide-house track, the plaintiff, without the knowledge of the engineer, Payne, climbed up the side ladder at the northwest corner of the car to the top thereof, and then walked eastward toward the east end of the car; that in doing so his back was toward the west,— toward the exhaust pipe,— the car being in the meantime pushed toward the pipe as fast as a man could walk (the plaintiff testified, as fast as a man could run); that the plaintiff continued to face the east, with his back towards the pipe, west of him, until the car went under the pipe, and he was struck by the pipe across the shoulders, and thereby knocked from the top of the car onto the ground, and run over by the engine, and permanently injured.

Such is a general summary of the situation and circumstances under which the accident occurred.

1. Error is assigned because the court admitted testimony tending to prove that the exhaust pipe in question might, at small cost and without injury to its efficiency, have been raised so as not to interfere with the defendant's employees riding upon the top of its freight cars. The reason given for such contention is that, as against the plaintiff, the defendant had the right to construct and locate the pipe as, in its judgment, would best accommodate its interest. The cases cited from this court in support of such contention all turn upon the assumption of risk, which will be considered later. *Naylor v. C. & N. W. R. Co.* 53 Wis. 661; *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113; *Guinard v. Knapp, Stout & Co. Company*, 95 Wis. 482; *Osborne v. Lehigh Valley C. Co.* 97 Wis. 27; *Mielke v. C. & N. W. R. Co.* 103 Wis. 3. And yet in all these cases the duty of the master to furnish a reasonably safe place in which the servant may perform his labor is recognized. Thus, in the

last case cited, Mr. Justice BARDEEN, speaking for the whole court, said: "The proposition that it is the duty of the master to furnish the servant a reasonably safe place in which to perform his labors has been laid down so many times by this court that it is unnecessary to cite decisions to support it." The same is true of cases cited by counsel for the defendant from other states. *Shanney v. Androscoggin Mills*, 66 Me. 420; *Wormell v. M. C. R. Co.* 79 Me. 397; *Batterson v. C. & G. T. R. Co.* 53 Mich. 125; *Ragon v. T., A. A. & N. M. R. Co.* 97 Mich. 265. In the first of these cases it was held that, "It is the master's duty not only to provide suitable machinery for the use of the servant, and that which shall impose upon the servant no other or greater danger than is naturally incident to the business or employment, but to exercise all reasonable care in keeping it in the same condition." The last two cases recognize the same rule. This court has repeatedly held that in certain cases it was a question for the jury to determine whether a given structure was so near the track or so near a passing car as to render it unnecessarily dangerous to persons employed in operating the train. *Dorsey v. Phillips & C. Const. Co.* 42 Wis. 597, 598; *Bessex v. C. & N. W. R. Co.* 45 Wis. 477; *Hulehan v. G. B., W. & St. P. R. Co.* 58 Wis. 319; *Kelleher v. M. & N. R. Co.* 80 Wis. 584, 588; *Colf v. C., St. P., M. & O. R. Co.* 87 Wis. 273; *Paine v. Eastern R. Co.* 91 Wis. 340; *Kennedy v. L. S. T. & T. R.Co.* 93 Wis. 32; *Curtis v. C. & N. W. R. Co.* 95 Wis. 460; *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109. In the first of these cases, RYAN, C. J., speaking of the custom of railroad companies to use such structures, said, "No custom, however uniform or universal, which unnecessarily exposes railroad employees to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condition of their charters." In that case the cattle chute was thirty-seven or thirty-eight inches from a vertical line from the track. In

the *Kelleher Case* the coal shed with which the plaintiff came in contact was twenty-two and one-half inches from the side of the mail car at its nearest point. In sustaining the verdict for the plaintiff in that case, this court said. "It is settled in this state that the duty of the company is to see that its tracks are not so obstructed as to render the duty of its employees unnecessarily hazardous." In the *Colf Case* the stub switch in the company's switch yard was so near the main track that its arm projecting at a height of two feet was only seven and one-half inches from the gangway step of the passing engine, where the plaintiff stood when injured, and two feet and seven inches from a vertical line from the nearest rail; and it was held that, as to employees working in the yard at night, the question of the defendant's negligence was for the jury.

It is undisputed that the exhaust pipe in question was, by actual measurement, fifteen feet and two and one-half inches above one of the rails directly under it, and a quarter of an inch nearer to the other rail. The height of the car in question, on the top of which the plaintiff was riding at the time of the accident, was twelve feet and five and one-half inches from the top of the rail to the top of the running board — in other words, it was two feet and nine inches from the top of that car to the exhaust pipe, and that car, which was a foreign car, was thirteen inches higher than the common box cars in use on the Wisconsin Central Railway (in other words, the top of the common box car in use on the Wisconsin Central was three feet and ten inches below the exhaust pipe in question); and such Wisconsin Central cars were the ones in general use in the defendant's yards. We must hold that there was no error in admitting the evidence complained of.

It follows from what has been said that there was no error in submitting to the jury, in the general charge, the question whether the defendant was in the exercise of ordinary care

in locating the exhaust pipe where it did, and, if the defendant was negligent in that regard, then whether such negligence was the proximate cause of the injury. The instructions of the court thereon appear to have been pertinent to the issue, and without any reversible error. The evidence on those questions is sufficient to support the finding of the jury to the effect that, by placing the exhaust pipe so near the top of such cars, the defendant made it unnecessarily hazardous for its employees riding upon the tops of such cars. There would seem to be no serious question but that such a structure, overhanging a railway track, under the circumstances mentioned, unobserved by a person riding upon the top of a freight car passing thereunder, would be dangerous to the person so riding.

2. The more difficult question is whether the plaintiff assumed the risk of such danger. It is undisputed that the plaintiff commenced work for the defendant in April, 1897; that he was employed as an errand boy to run errands, build fires, sweep out, and like chores, and that he should help the engineer, Payne, do the braking, *if he had time;* that he was sixteen years of age July 21, 1897, and hence two months and seventeen days older at the time of the accident; that prior to such employment by the defendant he had attended school eight months of each year, and worked on his father's farm, in the country, the balance of the time; that he weighed 144 pounds, but had never worked around railway stations or cars, or a sawmill, or farm machinery, or any machinery. The plaintiff testified to the effect that prior to the accident he had passed under the pipe on box cars seven or eight times — possibly ten times,— but that only two or three went upon the hide-house track, and they went further west than the chemical platform, where the car in question was to stop; that the other cars went on the other tracks to the bark sheds, still further west than the hide house; that he had never ridden upon the top of a car

under the pipe until the time of the accident; that, in all the switching he had done on the tracks running below the pipe, he had uniformly ridden on the side ladder until the car practically stopped, and then climbed to the top and set the brake, for the reason that it was new business to him, and he did not relish the idea of getting upon the top of a car when it was running fast; that he only did braking when not engaged in his regular work as an errand boy; that during July and August, 1897, he was engaged in haying for the defendant, and did not brake more than two or three cars; that he undertook to brake the car in question in pursuance of the request of the engineer to help place that car at the chemical platform, where it was to be stopped; that after getting the car from the Wisconsin Central tracks, and having it weighed, and the plaintiff opening the hide-house switch, forty-eight feet east of the pipe, as mentioned, the car was backed west by the engine, and about the same time that it started the plaintiff got onto the car at its northwest corner, where the ladder was; that as he got onto the ladder the car moved west rapidly — he should judge, as fast as a man could run; that he knew he had to be at the brake on the top of the car, at the southeast corner thereof, to set the brake and stop the car when it reached the chemical platform; that, after going up the ladder to the top of the car, he crawled on his hands and knees to near the middle of the car, and then started to walk east, fast, to the brake; that he did not know how far he got when he became unconscious — did not remember being struck, ceased to remember anything; that while so walking toward the brake he was thinking of setting it and stopping the car; that he did not think anything about the exhaust pipe, or about its being there, at the time; that he knew it was there, but never thought much about it; that he did not know how high that pipe was above the car, and did not then know whether the car was of ordinary height, or higher than usual; that he

had never watched the speed of cars with reference to this pipe, or made any observations as to how soon it would get under the pipe, considered from any particular point; that he had not been cautioned or given any instruction about that pipe, or the care to be used in going under it, or how far it was above the ground.

Such testimony of the plaintiff, or a considerable portion of it, was corroborated by other evidence. One witness, who saw the plaintiff when he was struck by the pipe, testified that the plaintiff had just straightened up, and was about eight feet from the east end of the car, when he was struck just about across the shoulders by the pipe; that as the pipe hit him he threw up his arms, and was pushed head-first over the end of the car. It appears that the track at and near the hide house was nearly level, and that the same was true of the other track at and near the bark shed, but that at or near the chemical platform the grade was at the rate of two feet in every 100 feet.

Upon such evidence, can we say, as a matter of law, that the plaintiff assumed the risk? In other words, Did such evidence justify the court in charging the jury as follows: The plaintiff "certainly knew the pipe was there. Any person would know that if he were on top of a rapidly moving box car, and came in collision with this pipe, he would be in danger. But did plaintiff know, or have such means of information as would charge him with knowing, the precise relation of the pipe to the track, to the box car, its distance from the box car, and the danger of passing under on such a car? If he did not know or have means of knowing these facts, and, from youth or inexperience, could not reasonably be expected to know them, and was not sufficiently warned of the danger, he would not be held to assume the risk of his employment. So, in these instructions as to the dangers which the plaintiff knew or ought to have known, I think you should not only consider that he knew the pipe was

there, and that if he collided with it he would be injured, but you should inquire whether he appreciated, or ought to have appreciated, the precise danger,—the relation of the pipe to the track, to the box car, and its distance from the box car, and the danger of passing under, on such a car"? The exception to the last portion of such instructions is especially relied upon. In the *Dorsey Case* cited (42 Wis. 597), Chief Justice RYAN said: "If he [the plaintiff] knew, or ought reasonably to have known, the *precise danger* to him, in the course of his employment, of the cattle chute in question, and saw fit, notwithstanding, to continue in his employment, he might be held to have assumed the extraordinary risk, as well as the ordinary risks, of his service. . . . But it appears to us that this consequence of acquiescence ought to rest upon positive knowledge, or reasonable means of positive knowledge, *of the precise danger assumed*, not on vague surmise of the possibility of danger. And there might be serious difficulty in applying the principle to a case like this. The safety of railroad trains depends largely upon the exclusive attention of those operating them to the track and to the trains themselves." Pages 598, 599. Such language has been frequently quoted, or referred to approvingly, in later cases in this court. *Nadau v. White River L. Co.* 76 Wis. 132; *Haley v. Jump River L. Co.* 81 Wis. 426; *Colf v. C., St. P., M. & O. R. Co.* 87 Wis. 276; *Luebke v. Berlin Machine Works*, 88 Wis. 448; *Kennedy v. L. S. T. & T. R. Co.* 93 Wis. 39. Such rules have been repeatedly applied by this court to adults with more or less experience. Certainly the rule should not be less favorable to a youth of the plaintiff's age and limited experience, injured under the circumstances detailed. As indicated, he was only expected to do the braking in case he had time from his regular work of running errands, building fires, sweeping out, and doing similar chores. True, he knew that such pipe was suspended over the track, but he did not

know its height from the track, nor the distance from the pipe down to the top of an ordinary box car — much less, from the pipe down to the top of the car in question,— nor whether that car was different in height from ordinary box cars; and he had never been on the top of such a car while passing under such pipe before, nor attempted to set the brake on a car to be stopped at the chemical platform before, and he had never observed the speed of such cars with reference to such pipe. Under the circumstances of this case, and the repeated decisions of this court, we think the trial court properly refused to hold, as a matter of law, that the plaintiff assumed the risk, and properly submitted to the jury the question whether the plaintiff appreciated, or ought to have appreciated, the precise danger of riding upon the top of such car while passing under such pipe.

Counsel for the defendant seem to think that the jury were misled by the use of the words "appreciated the precise danger," in the portion of the charge quoted. The words "precise danger" were manifestly taken from a portion of Chief Justice RYAN's opinion in the *Dorsey Case* (42 Wis. 597), quoted above. They are there used to distinguish "the extraordinary risk" to which the plaintiff was subjected from "the ordinary risks of the service." As used in the charge in the case at bar, they are explained, as applicable to "the relation of the pipe to the track, to the box car, and its distance from the box car, and the danger of passing under on such a car." They simply called the attention of the jury to the particular danger of the plaintiff being knocked off the car by the pipe while on the top of the car, as distinguished from dangers generally by reason of working in the defendant's yards, and hence were used to prevent the jury from being misled.

There was no error in submitting to the jury the question whether the plaintiff "appreciated, or ought to have appreciated," such danger. To appreciate such danger was "to

be fully aware of" such danger,—to know or comprehend such danger. In the *Dorsey Case*, Chief Justice RYAN suggested a similar thought in respect to an adult with a considerable experience, by the use of the words "positive knowledge." That a boy of the plaintiff's age at the time of the accident would be less likely to know, to comprehend, to be fully aware of, such danger, than a person of mature years, goes without saying, and has often been recognized and sanctioned by this court. *Jones v. Florence M. Co.* 66 Wis. 268, 277, 278; *Neilon v. Marinette & M. P. Co.* 75 Wis. 579, 585, 586; *Nadau v. White River L. Co.* 76 Wis. 120, 129; *Chopin v. Badger P. Co.* 83 Wis. 192, 196–198; *Thompson v. Johnston Bros. Co.* 86 Wis. 576; *Luebke v. Berlin M. Works*, 88 Wis. 442, 448, 449; *Wolski v. Knapp, Stout & Co. Company*, 90 Wis. 178; *Kucera v. Merrill L. Co.* 91 Wis. 637, 643; *Egan v. Sawyer & A. L. Co.* 94 Wis. 137; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277. In charging the jury upon that subject the court, among other things, said: "If you find that the nearness of this overhead steam pipe to the top of a box car passing under it was a danger to which the plaintiff was exposed in the performance of his duty while braking, and that it was danger which was known and comprehended by him, or was such an open or obvious danger as that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable and ordinary care, to have known and appreciated it, then the law is that the plaintiff assumed the risk of such danger, and that he cannot recover." With the uncertainties mentioned, and the constantly changing conditions by reason of the movement of the car and the ascent of the grade, the court was fully justified in giving the portion of the charge quoted.

3. From what has been said, it is obvious that the trial court was justified in submitting to the jury, with appropriate instructions, the question whether the defendant was

negligent in failing to sufficiently instruct or caution the plaintiff as to the danger of riding upon the top of a car while passing under the pipe. In charging the jury upon that subject, the court said, in effect, that the jury should consider the plaintiff's age, and the statements made to the defendant's superintendent by the plaintiff's brother-in-law when application was made for the position for the plaintiff to work, to the effect that the plaintiff was nearly eighteen years of age. The evidence is pretty strong that the plaintiff had received general instructions about switching and coupling cars, and the defendant's engineer testified that he had warned him to keep off from the top of such cars while in motion; but the plaintiff flatly contradicts such statement, and we must hold that the evidence is sufficient to support a finding that he was not warned to keep off the top of such car or cars while passing under the pipe.

4. It is contended that the undisputed evidence shows that the plaintiff was guilty of contributory negligence. This is based upon the assumption that he knew the height of the pipe above the track and above the car; that upon former occasions he had ridden upon the ladder at the side of the car until it passed under the pipe, and reached to or near its place of destination, before going upon the top to set the brake, and that in the case at bar he went upon the top of the car before it passed under the pipe, and then failed to remember the overhanging pipe, so as to avoid being struck by it. In support of the verdict in favor of the plaintiff, we are required to consider the evidence in his behalf in the most favorable light it will legitimately bear. *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626; *Kaples v. Orth*, 61 Wis. 531, 533; *Adams v. C. & N. W. R. Co.* 89 Wis. 645. According to such evidence, it appears that all other cars which passed under the pipe, and upon which he set the brakes, were destined to places considerably west of the chemical platform, and where the grade was comparatively level, and

hence no necessity of being at the brake until the car practically stopped; that he had never before ridden upon the top of such a car, under the pipe, for the reason that it was new business to him, and he did not relish riding upon the top of such a car while in rapid motion; that the switch which the plaintiff turned was only forty-eight feet east of the pipe, and the chemical platform, where he was to set the brake and stop the car, was only 120 feet west of the pipe; that the car moved fast up a rapidly ascending grade, and was to be stopped on such grade; that he did not know that the pipe was so near the top of the car as to hit him while in the act of setting the brake. The difficulty of a nonexpert, standing upon the ground, accurately judging the height of a pipe thus suspended in the air, especially when viewed from a lower grade, is apparent. Manifestly the plaintiff was intently absorbed in the thought of setting the brake under circumstances which he had never before encountered, but that would be no excuse if he had actually assumed the risk. We must hold that the finding of the jury that the plaintiff was not guilty of contributory negligence is sustained by the evidence.

5. It is contended that the damages are excessive. The plaintiff was injured between four and five o'clock in the afternoon of Friday, October 8, 1897, and remained unconscious until the following Sunday, but his recollection of what occurred on the day of the accident and before did not begin to come back to him until about two weeks after the injury. The medical testimony tends to prove that when he was found, after the accident, his right arm was nearly severed between the shoulder and the elbow,— a little nearer to the shoulder than the elbow; that that arm was at once amputated about two inches below the shoulder joint, and dressed; that the left arm was dislocated at the elbow; that the ulna was dislocated backwards and downwards; that the radius was dislocated from the ulna, up-

wards and forwards; that there was great difficulty in reducing the dislocation of the radius, on account of its being fractured on the wrist, and hence they had no chance to pull; that the radius was also broken, and they set the radius and put the whole arm in splints; that there was a cut by some sharp instrument on his head to the skull, about an inch long, which they sewed up, putting in about three stitches; that the left arm was badly used up; that the chances for the arm looked worse after a day or two; that it was badly swollen at the elbow and discolored, and very painful; that, in order to keep the radius in place, it had to be put in a straight splint temporarily; that it pained so they took that off and put on short splints, in order to get a little flexion at the elbow; that the arm was swollen quite badly; that it was placed in a box to fit the arm; that subsequently all the splints were taken off, and the arm was put into a plaster of paris cast from the wrist nearly to the shoulder; that when that got dry they split the cast to the elbow, to permit a little movement in the joint; that it pained so that they cut a large hole right over the fracture, and found it swollen and discolored; that the skin broke, and matter escaped, caused by the fracture of the bone and the tearing of some of the soft tissues around it at the time of the accident; that the worst trouble was in the elbow; that during such treatment he was troubled with a want of sensation in his hand,—did not have any feeling in his fingers, and had no use of them; that he first began to use his thumb, then the little finger and the one next to it, but not either of the other two; that he had difficulty in passing his urine, and had to use a catheter for several days; that he complained a great deal about his aches and pains; that he was able to be up and around four or five weeks after the injury; that at the time of the trial, which was eighteen months after the injury, the arm was smaller than before a short distance above the wrist joint, and larger than formerly

further up; that the wasting away of the tissues would cause it; that, if that was the cause, that would indicate that there had been an injury to the nerves, and possibly to the circulation supplying those muscles; that the bone itself had united; that the elbow joint was in pretty fair shape—more movement to it, and the fingers were better—more use of them; that they did not think the arm would ever be as good as before, and could not say whether or not he would be able to use it for ordinary purposes, as helping himself at the table, dressing himself, writing, or doing light work; that the arm did not look unhealthy. Another doctor testified that he found a grating sound in the joint between the radius and the ulna, due to chronic inflammation in that joint, which, in his opinion, would be a permanent defect in that joint; that the effect of deep-seated inflammation upon the nerves was to lessen the functional activity of the nerve cells and nerve fibers, and was liable to cause degeneration of the nerves and produce paralysis; that, in his opinion, the arm would never improve. Another physician, in answer to a hypothetical question, testified to the effect that the trouble about passing urine would indicate either a local cause in or about the bladder, or some disturbance in the portion of the spinal cord upon which the functions of the bladder depended, or it might result from injury to the brain. It appears that prior to the injury the plaintiff was healthy, and weighed 144 pounds, and was receiving $1 per day, and at the time of the trial was in as good health as could reasonably be expected under the circumstances. Upon the subject of damages the court charged the jury that, if they found for the plaintiff, they might include, as damages, not only his physical and mental pain and suffering, but also such sum as would compensate him for such diminished earning capacity in the future, after reaching his majority, as they should find from the evidence was reasonably certain to result from his injuries.

Of course, it is very difficult to measure pain and suffering with money. But the legal measure of damages must necessarily be based upon some practical pecuniary basis. In our judgment, the evidence in the case, and the rules of law stated, did not authorize the jury to return so large a verdict as they did. Twenty thousand dollars, at interest, would enable the plaintiff to receive annually several times more than he was earning, without touching the principal. Of course, he is entitled to be fully compensated for such pain and suffering, as well as for his diminished earnings. In view of the former rulings of this court, we are forced to the conclusion that the damages assessed by the jury in this case are largely in excess of what was warranted by the law and the evidence. *Heddles v. C. & N. W. R. Co.* 74 Wis. 259; *S. C.* 77 Wis. 228, 235; *Waterman v. C. & A. R. Co.* 82 Wis. 613, 638; *Donovan v. C. & N. W. R. Co.* 93 Wis. 373, 377; *Taylor v. C. & N. W. R. Co.* 103 Wis. 27, 32; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 333-336; *Crouse v. C. & N. W. R. Co.* 104 Wis. 473, 486.

By the Court.—By reason of such excessive damages, the judgment of the circuit court is reversed, and the cause is remanded for a new trial, but with the option on the part of the plaintiff, to be exercised within thirty days after the filing of the *remittitur* from this court in the trial court, to remit, in writing, from the verdict, all damages in excess of $12,000, and file such remission with the clerk of the trial court, in which event judgment is to be entered thereon for the amount stated, as damages, and the costs and disbursements in the circuit court.

MARSHALL, J. The most important question presented by this appeal is, Was the evidence sufficient to carry the case to the jury as to whether *Renne* knew or ought to have known of the danger of standing on a box car while it was passing under the exhaust pipe? It seems that such

question should be answered in the affirmative, and that the trial court and this court reached a different conclusion by giving weight to evidence so at variance with conceded facts as not to raise a conflict therewith for the consideration of the jury. The testimony referred to is to the effect that *Renne*, while walking in an upright position on the running board of the car, was struck by the exhaust pipe in the region of his shoulders, and that the car was thirteen inches higher than ordinary cars, such as he was familiar with and had often assisted in operating under the pipe. Significance was given to that testimony by the trial court in the instructions to the jury, and special significance was ascribed to it by my brethren, as will be seen by reference to the opinion of the court, the idea evidently being that such testimony warrants a belief that the pipe was high enough to have cleared, or nearly cleared, the boy's head if he were on an ordinary car, and that it was so near the boundary line between danger and safety as not to be, as matter of law, obviously dangerous to a boy of *Renne's* intelligence and experience.

The conceded facts above referred to are stated in the opinion of the court in substance as follows: The pipe was thirty-three inches higher than the running board of the car on which *Renne* was riding when injured and forty-six inches higher than the running board of an ordinary car. Such facts, in connection with the undisputed evidence that the boy was five feet nine inches tall and weighed 144 pounds—a man, almost, in stature and physical development—show conclusively that the testimony indicating that the exhaust pipe was as high as his shoulders as he was walking on the running board of the car, is not entitled to any consideration, leaving no room for belief that the boy could have failed, had he exercised reasonable attention to his surroundings during the months prior to his injury, to have known that the pipe was too low to admit of his safely passing under it

standing on any box car. Instead of the pipe being high enough to about clear *Renne's* head while he was walking upright on an ordinary box car, it was about two feet lower, and instead of its being as high as his shoulders, as he was walking on the running board of the large car, it was about as high as the upper part of his thighs. The testimony referred to, which was considered by the lower court and jury and by this court, and which led to the result complained of, plainly is not entitled to any credence whatever. It should have been disregarded. *Badger v. Janesville C. Mills*, 95 Wis. 599; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352.

From what has preceded it seems that in deciding the controversy of whether there was evidence to warrant a finding that *Renne* knew, or ought to have known, the dangers incident to his employment, as the work was being carried on, occasioned by the location of the exhaust pipe, we must face the fact that such pipe would have been two feet lower than the top of his head if he had been standing at the time of his injury on such a car as those with which he was perfectly familiar and had often assisted in operating under it. In that view we venture to say that there can be but one reasonable conclusion: A boy of ordinary comprehension, of the age of *Renne*, possessed of his experience and circumstanced as he was for months before his injury, could not reasonably have failed to have observed the dangerous location of the pipe. It was but about two thirds of the boy's height above the running board of an ordinary car. To safely pass under it, standing on such running board, he would necessarily have been required to have bent his body down at an angle of over 45°. A situation so dangerous as that could not reasonably escape the notice of any sixteen-year-old boy capable of working at the handling of cars if he paid any reasonable attention to his surroundings.

It follows, in my judgment, that *Renne* knew, or was

clearly guilty of a want of ordinary care for not knowing, the dangers of his employment, caused by the exhaust pipe, and that his attempt to pass it on the occasion of his injury, regardless of such dangers, is attributable wholly to his forgetfulness, for which on legal principles he alone is responsible.

BARDEEN, J. To my mind, the danger which menaced the plaintiff was so open and obvious, and so well known to him, that it should have been held, as a matter of law, that he assumed the risk of accident. No warning that the defendant could have given him would have made it more apparent. He simply forgot the existence of the pipe, and his forgetfulness cannot be charged to the defendant. The real inquiry was, Did plaintiff know, or ought he, under all the circumstances, reasonably to have known, that there was danger of accident from the proximity of the pipe in question to the top of the car? If he did, then he assumed the risk, and all the discussion over "knowledge of the precise danger" and "appreciation of the risk" leads to confusion, rather than enlightenment. I agree that the damages are excessive.

A motion for a rehearing was submitted for appellant on the brief of *Cate, Sanborn, Lamoreux & Park*, attorneys, and *Geo. W. Bird*, of counsel.

Motion denied September 5, 1900.

WATSON, Respondent, vs. THE CITY OF MILWAUKEE, Appellant.

April 28 — September 25, 1900.

Appeal: Bill of exceptions: Printed case: Questions reviewed.

1. Where there is no bill of exceptions returned with the record, errors assigned, based upon rulings made on the trial, cannot be reviewed, although the printed case contains what purports to be a copy of a regularly settled bill of exceptions.
2. Where no bill of exceptions is returned with the record, the only question open is whether the pleadings and verdict sustain the judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries suffered by the plaintiff from a fall upon the sidewalk on the south side of Mason street, in the city of *Milwaukee*, on the 5th of February, 1898. The defect which was alleged to exist in the sidewalk was a sharp and excessive incline in the walk towards the west, combined with a pitch to the north, both of which inclines were alleged to be contrary to the established grade of the street and the ordinances of the city. At the time of the accident the walk (which was constructed of artificial stone) was covered with a smooth coating of ice and snow, on which the plaintiff alleges she slipped and fell on account of the unlawful and excessive inclines aforesaid and the accumulation of ice and snow thereon. The answer denied all negligence or improper construction of the sidewalk, and admitted the giving of sufficient notice to the city.

Upon the trial a special verdict was rendered as follows: "(1) Was the plaintiff injured substantially as charged in her complaint, on the 5th day of February, 1898, by falling on the sidewalk at or near the southwest corner of the crossing of Milwaukee and Mason streets, in the city of *Milwau-*

kee? Yes. (2) Was the place where the plaintiff fell insufficient and unsafe for pedestrians exercising ordinary care, and having occasion to use the same? Yes. (3) If you answer the last interrogatory in the affirmative, was such insufficiency and want of safety the proximate cause of the plaintiff's injury? Yes. (4) Did such insufficiency consist in part in the inclination from the horizontal of the surface of said sidewalk at the place where the plaintiff lost her foothold and fell? Yes. (5) Did such insufficiency and want of safety consist in part in the accumulation of snow and ice upon said sidewalk at that place? Yes. (6) If you answer the last interrogatory in the affirmative, had such accumulation of snow and ice at the time of the plaintiff's fall and injury been upon said sidewalk at that place long enough to require the proper officers of the city to attend to the clearing away of the same, or making the same safe for passengers in some way? Yes. (7) If you answer the last interrogatory in the affirmative, ought the officers of the city chargeable with the care of its streets and sidewalks, in the exercise of ordinary intelligence, to have anticipated that said accumulation of snow and ice, in the condition in which it then was, was liable to cause some pedestrian to fall and be injured? Yes. (8) If you find in answer to the fourth interrogatory that the inclination from the horizontal of the surface of said sidewalk at the place where the plaintiff was injured was in part the occasion of a fall, ought the officers of the defendant corporation, in the exercise of ordinary intelligence and proper skill, to have anticipated that said inclination was liable to cause the fall and injury to a pedestrian in using said sidewalk at that place, using ordinary care? Yes. (9) Was the defendant city and its officers chargeable with the condition and care of its streets and sidewalks guilty of any want of ordinary care on their part which was the proximate cause of the plaintiff's injury;—a proximate cause being an efficient,

first cause, by reason of which a man of ordinary intelligence would at the time and place and under the circumstances in question have anticipated that a pedestrian passing over said sidewalk on foot was liable to fall and be injured by reason of the condition of the sidewalk at that place? Yes. (10) Was the plaintiff guilty of any want of ordinary care on her part which proximately caused or contributed to the injury of which she complains? No. (11) If the court should be of the opinion that the plaintiff is entitled to judgment, at what sum do you assess her damages? $2,500."

Upon this verdict judgment for the plaintiff was rendered, and the defendant appeals.

Carl Runge, city attorney, and *C. H. Hamilton*, of counsel, for the appellant.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *W. C. Quarles*.

The following opinion was filed May 15, 1900:

WINSLOW, J. All the errors assigned in this case are based upon rulings made upon the trial, hence they cannot be reviewed in the absence of a bill of exceptions. No such bill has been returned to this court, although the printed case contains what purports to be a copy of a regularly settled bill of exceptions. We cannot, however, consider it, as the record contains no bill, and we cannot go beyond the record. Upon the record returned, the only question open is whether the pleadings and the verdict sustain the judgment. *Wille v. Bartz*, 88 Wis. 424. It is apparent that they do, and hence the judgment must be affirmed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied September 25, 1900.

McEVOY, Respondent, vs. GALLAGHER and others, Appellants.

September 4 — September 25, 1900.

Waters: Diversion: Natural watercourse: Contempt: Violation of injunction: Findings: Appealable order.

1. Under sec. 3489, Stats. 1898, applicable to contempt proceedings to enforce the civil remedy of the plaintiff and protect his rights in the action (providing that if "the court shall adjudge the defendant to have been guilty of the misconduct alleged, *and* that the misconduct was calculated to, or actually did, defeat, impede or prejudice the rights or remedies of any party in a proceeding pending in such court, it shall proceed to impose a fine," etc.), the court found the defendants "guilty of a technical violation" of an injunctional order, but failed to find that "the misconduct was calculated to, or actually did, defeat, impede or prejudice the rights and remedies" of the plaintiff. *Held* that, in the absence of the findings required by statute, an order requiring defendant to pay a fine and the costs of the proceedings was without authority.
2. Such order, being one that affects the substantial rights of the defendants, and being made in a special proceeding, is appealable.
3. Where a natural watercourse has run across a highway to and across plaintiff's land from time out of mind, the plaintiff's right to the natural flow of the water in the stream, as a natural incident to the right to the soil itself, is the same as he has to other natural advantages belonging to the land of which he is the owner, and injury and damage from a threatened diversion are presumed and need not be proved.

APPEAL from an order and a judgment of the circuit court for Juneau county: O. B. WYMAN, Circuit Judge. *Order reversed, judgment affirmed.*

For the appellants there was a brief by *A. H. Smith*, attorney, and *Curtis, Reid, Smith & Curtis*, of counsel, and oral argument by *A. H. Reid* and *A. H. Smith.*

For the respondent there was a brief by *H. W. Barney*, attorney, and *A. L. Sanborn*, of counsel, and oral argument by *Mr. Barney* and *Mr. L. K. Luse.*

CASSODAY, C. J. This action was commenced August 18, 1898, against the supervisors of the town of Plymouth, and their agents, employees, or contractors, to restrain them from diverting a creek, or any part thereof, running into the Baraboo river, from the plaintiff's land. Such proposed diversion is admitted, but is sought to be justified on the ground that it was necessary in the proposed improvement of the public highway running north and south along the west side of the plaintiff's premises. It is conceded, in effect, that the creek came in from the west, and crossed the highway under a bridge, and entered the plaintiff's land, and then, after running in an easterly direction to a point on the plaintiff's land about 150 feet from the center of the highway, turned and ran in a southerly direction for a short distance, and then turned and ran in a westerly direction, and recrossed the highway under a bridge about 150 feet south of the place where it first crossed the highway, and that said creek had so run on the land owned by the plaintiff from time out of mind.

At the time of the commencement of the action a preliminary injunction was granted by a court commissioner restraining the defendants from diverting from the plaintiff's land any part of the water flowing in such creek.

August 24, 1898, the defendants answered by way of admissions, denials, and counter allegations. September 8, 1898, a supplemental injunction was issued by the county judge requiring the defendants to absolutely desist and refrain from diverting any part of the waters of said creek from the land of the plaintiff, "and from filling in the bed of said stream, in whole or in part, at any place between its banks upon above plaintiff's said lands, and from constructing or maintaining any ditch across the said bend of said river." Subsequently the defendants moved to modify such injunctional orders, which the plaintiff opposed, and moved to punish the defendants for contempt for the

violation of such injunctional orders. Upon the hearing of such motions, and after considering the pleadings and affidavits upon which they were respectively based, the circuit court, on October 6, 1898, found, in effect, that the defendants and each of them was and is guilty of a technical violation of the injunction so issued by the county judge, in that piling and some material was put into the bed of said stream by the defendants after the service of the second injunctional order, and that the defendants pay a fine of $1, and the costs of such motion, taxed at $20, and the sheriff's fees in serving the order to show cause on which such matter was so founded, taxed and allowed at $15.70, and the clerk's fees, taxed at $1.25, making in all the sum of $36.95. Subsequently the cause was tried upon the merits, and, in addition to the facts stated, the court found, in effect, that August 1, 1898, the defendant supervisors entered into a contract with the defendants *Greutzmachers* to repair such highway by taking out both of the sixty-foot bridges, and replace the south bridge with a twelve-foot bridge, and fill up the bed of the stream at the north bridge with an embankment thirty-eight feet wide, and to place under such embankment eighteen-inch tiling, thirty-eight feet long, for the flow of the stream, and to cut a ditch on the west side of the highway opposite such lands, from the south bank of the stream west of the north bridge to the north bank of the stream west of the south bridge, such ditch to be dug deep enough so that the bottom of the north end thereof should be three feet above the then stage of water in such stream, "which was then very low," and the south end thereof to run to the level of the water in such stream; that the south bank of the river west of the north bridge was to be protected by plank and posts to a height of three feet from the bottom of such ditch down to the surface of said stream; that the defendants *Greutzmachers* commenced to do the work in accordance with such contract, August 15,

1898; that such stream was and is subject to annual rises of from four to six feet above the stage of water at the time of the taking out of such bridges, and the tiling so threatened and intended by the defendants to be put in the place of said north bridge would have been entirely insufficient to allow the water annually and usually flowing in said stream to enter and flow across the lands of the plaintiff, as it had been wont to do from time out of mind; that if such work so contracted and so threatened to be done by the defendants had been accomplished the result thereof would have been to divert from the plaintiff's lands, and from their natural channel, the waters of said stream, to the permanent and irreparable injury and damage of the plaintiff; and, as conclusions of law, the court found, in effect, that the defendants had no right to divert such stream, or any portion thereof, from the lands of the plaintiff; that at the time of the commencement of this action the plaintiff was entitled to the temporary injunctions mentioned, and was entitled to judgment perpetually enjoining and restraining the defendants from doing anything to obstruct the flow of the water in such stream upon and off his said lands, and ordered judgment accordingly, but without costs, except as therein stated. From the judgment so entered, the defendants bring this appeal. They also appeal from the order so entered punishing them for contempt.

The order adjudging the defendants guilty of contempt, and all papers, affidavits, orders, interrogatories, and answers upon which it was based, are each and all entitled in this action. The contempt proceedings were instituted by and for the benefit of the plaintiff. The issue made up in such contempt proceedings was strictly between the parties, and was tried by the court in pursuance of the statutes. Secs. 3480–3482, 3487, 3488, Stats. 1898. Upon such trial the court only found that the defendants were "guilty of a technical violation" of such injunctional order so made by the county

judge, "in that piling and some material was put into the bed of said stream by the defendants after the service of" that order, and also required the defendants to pay, for the benefit of the plaintiff, $36.95 costs, in addition to the fine of $1.

The section of the statutes applicable to such a proceeding for a mere civil contempt provides that "if . . . the court shall adjudge the defendant to have been guilty of the misconduct alleged, *and* that the misconduct was calculated to or actually did defeat, impede or prejudice the rights or remedies of any party in an action or proceeding pending in such court, it shall proceed to impose a fine or to imprison him, or both, as the nature of the case shall require." Sec. 3489, Stats. 1898. The statute is mandatory, but the trial court made no such adjudication or finding. It was not the case of misconduct committed in the immediate view and presence of the court, and hence calling for summary punishment. Sec. 3478, Stats. 1898. Nor was it a case calling for an exercise of the inherent power of the court to punish as and for a criminal contempt. Sec. 2565; *State ex rel. Att'y Gen. v. Circuit Court*, 97 Wis. 1. The proceedings were to enforce the civil remedy of the plaintiff, and to protect his rights in the action. But no finding or adjudication in his favor was made as required by the statute, and hence the order was made without authority. It affected the substantial rights of the defendants, and was made in a special proceeding, and is therefore appealable. *State ex rel. Meggett v. O'Neill*, 104 Wis. 227.

Upon the merits, we are clearly of the opinion that the judgment should be sustained. The findings of the court mentioned are abundantly supported by the evidence. While there is no claim nor pretense that the defendants entered upon or used any portion of the plaintiff's land, yet it is clearly established that the avowed object of the defendants was to prevent a portion of the waters of the stream

from flowing onto the plaintiff's land, and to cause such surplus waters to flow from a point in the stream above the plaintiff's land in the ditch mentioned, south along the west side of the highway, to a point in the stream below the plaintiff's land, as stated. Counsel contend that the plaintiff has failed to show that the proposed improvement would be of any injury or damage to his land, and that the finding of the court that it would be to the "permanent and irreparable injury and damage of the plaintiff" is unsupported by the evidence. But it is well settled, and is in fact elementary, that "Riparian proprietors, upon both navigable and unnavigable streams, are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. Each proprietor may therefore insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level." Gould, Waters, § 204, citing numerous authorities in support of the proposition. The plaintiff had the same right to such natural flow of the water in the stream, as a natural incident to the right to the soil itself, as he had to other natural advantages belonging to the land of which he was the owner. *Id.; North Shore R. Co. v. Pion*, 14 App. Cas. 621; *Kaukauna W. P. Co. v. Green Bay & M. C. Co.* 75 Wis. 390. Injury and damage in such a case is presumed, and need not be proved.

By the Court.—The order of the circuit court adjudging the defendants in contempt is reversed, and the cause is remanded with directions to dismiss such proceedings for contempt, with costs of such proceedings to be taxed against the plaintiff, and in favor of the defendants. The judgment of the circuit court upon the merits is in all things affirmed, with costs in favor of the plaintiff and against the defendants.

JOHNSTON and another, Respondents, vs. NORTHWESTERN LIVE STOCK INSURANCE COMPANY, Appellant.

September 4—September 25, 1900.

(1, 2) *Appeal: Undertaking: Corporate suretyship: Justification of sureties: Certificate of commissioner of insurance: Perfecting undertaking on leave of supreme court.* (3–8) *Insurance of live stock: Condition of policy as to notice: Forfeiture: Promissory warranty: Breach: Mortgage: Amount due: Court and jury:* Res adjudicata: *Representation or warranty.*

1. Under the statutory provisions,—sec. 3052, Stats. 1898, requiring the execution of an undertaking for costs by two sureties to render an appeal effectual for any purpose; sec. 3065, providing that such an undertaking shall be of no effect unless accompanied by the affidavits of the sureties justifying as required; and sec. 1966—34, providing that a certified copy of the certificate of the insurance commissioner as to the authority of a surety company to transact business shall be *equivalent* to the justification required of sureties by law,—an undertaking for costs on appeal, executed by a surety company, must have attached such certificate of the commissioner of insurance in order to make the appeal effective.
2. In this case, where the insurance commissioner's certificate was not attached to an undertaking for costs on appeal, executed by a surety company, leave was granted, on payment of motion costs, to perfect the undertaking by attaching thereto such certificate.
3. Where an insurance policy on a horse contained a provision that, in case of sickness, the insured should *at once* notify the company by telegram, otherwise the policy to be void, the fact that the horse took sick in the morning of Sunday, and died in the afternoon of that day, and that there was no telegraph station nearer than nine miles, is insufficient to excuse failure to comply with that stipulation of the policy.
4. In such case the agreement as to notification is in the nature of a promissory warranty, which must be strictly fulfilled before there can be a recovery; and nothing short of impossibility of fulfillment can excuse its breach.
5. In such case the question of the materiality or usefulness of the agreement to notify the insurance company *at once* by telegraph in case of the sickness of the horse, is not open to be submitted to the jury.

6. Action having been brought on an insurance policy covering a horse incumbered by a mortgage for $800, it appeared that, in the application for such policy, it was stated that the horse was mortgaged for $500, and that such statement was warranted to be true. It further appeared that after delivery of the mortgage and before the insurance was effected the mortgagor had paid $300 or more to the mortgagee, who at once applied the payment on other indebtedness due him from the mortgagor. It did not appear that the mortgagor made or attempted to make application of such payment upon the mortgage. *Held*, that the evidence showed without dispute that the amount of the incumbrance was $800 and interest; and that a question in the special verdict. What was the amount of the incumbrance on the horse at the date of making the application for the policy in suit? should have been answered by the court instead of being submitted to the jury.
7. Where on the retrial of an action, after appeal to the supreme court, the evidence is no more extensive upon the questions at issue than upon the former trial, the propositions of law laid down on the former appeal are *res adjudicata*, and must control, whatever the appellate court may think, on the second appeal, as to their soundness.
8. The application for the policy in suit contained a statement that the mortgage on the property insured was $500, when in fact it was over $800, and such statement was made a warranty by other provisions of the application. The insured testified that he told the agent the incumbrance was *about* $500, and remembered nothing further that was said in regard thereto. *Held* that, in the absence of the further statement by the insured that he did not know the amount of the incumbrance, together with the knowledge of the agent who wrote the amount into the application that assured did not know it and was not pretending to state it, the statement in the application was not a representation merely, but a warranty, which, being clearly breached, avoided the policy. Language in *Johnston v. Northwestern L. S. Ins. Co.* 94 Wis. 117, *held* not to have been intended as a decision that, if the insured said "about $500," it would be a representation merely, but if he said "$500," it would be a warranty.

APPEAL from a judgment of the circuit court for Monroe county: O. B. WYMAN, Circuit Judge. *Reversed.*

This is an action upon a policy of insurance upon a horse for the sum of $800. The case was here upon an appeal

from a former judgment, and was reversed for error, 94 Wis. 117. The evidence shows that the horse was chattel mortgaged by the plaintiff *Johnston* to the plaintiff *Smith*, and the policy was made payable to the plaintiff *Smith* as his interest as mortgagee might appear. There was a written application for the policy, signed by *Johnston*, in which it was stated that the horse was mortgaged to *Smith* for $500, and the application provided that the statements contained therein were warranted to be true. The policy also provided that it was made and accepted upon the understanding and agreement that all the statements made in the application were true, and were warranted to be true. There was a further provision in the policy as follows: "That said insured has agreed and is required to use due diligence, precaution, and care in the use, and for the safety, health, and preservation, of said live stock, and in case of sickness or accident agrees to promptly summon to his aid the best veterinary surgeon to be had in the vicinity, or, if none can be had, to otherwise provide the best available care and attention; and he shall at once notify this company, by telegram, of the fact of such sickness or accident; otherwise, this policy shall be void." The horse died of disease on November 5, 1893, and due proofs of loss were made on or about November 13th following. The defenses brought by the company were, first, that the horse was in fact mortgaged for $800 instead of $500, and that the company was never notified by telegram of the sickness of the horse, as provided in the policy.

The court submitted certain special questions to the jury in addition to the general verdict, which questions, and the answers thereto, were as follows: "(1) What was the amount of the incumbrance by mortgage on the horse Honfleur at the date of the making of the application for the policy in suit? *A.* $525. (2) Did the plaintiff *Johnston*, at the time the application was made, state to the agent of the

company that there was a mortgage of five hundred dollars ($500) on the horse? *A.* No. (3) Did the plaintiff *Johnston*, at the time the application for the policy was made, state to the agent of the company that there was a mortgage of about five hundred dollars? *A.* Yes. (4) Was the statement as to the incumbrance or mortgage upon the horse made by the plaintiff *Johnston* to the agent of the company at the time of the application for insurance a warranty or representation merely? *A.* Representation. (5) Did the plaintiff *Johnston* promptly summon to his aid the best veterinary to be had in the vicinity to care for the horse? *A.* Yes. (6) In case you answer the foregoing question in the negative, then, before the veterinary Snow arrived at Ontario to treat the horse, did *Johnston* otherwise provide the best available care and attention for the sick horse? *A.* Yes. (7) Did the plaintiffs or either of them at once notify the defendant company by telegram of the fact that the horse was sick? *By the Court:* No. (8) Could the plaintiff *Johnston*, by the exercise of ordinary care and reasonable diligence, under the circumstances of the case, have sent a telegram to the defendant after he knew the horse was sick, and before the animal died? *A.* No. (9) In case the plaintiffs are entitled to recover under the law, at what sum do you assess their damage? *A.* $981.35. (10) For which party do you find,— for the plaintiffs or for the defendant? *A.* For the plaintiffs."

Upon this verdict judgment for the plaintiffs was rendered, and the defendant appealed.

For the appellant there was a brief by *N. T. Guernsey*, *W. H. Wallingford*, and *S. W. Button*, and oral argument by *Mr. Button* and *Mr. Wallingford.*

C. M. Masters, for the respondents.

WINSLOW, J. A motion to dismiss the appeal in this case on the ground that no sufficient undertaking had been given

was made by the respondents prior to the argument, and this motion must first be considered. The undertaking upon the appeal was executed by the United States Fidelity & Guaranty Company, a foreign suretyship corporation, duly admitted to transact business in this state under the provisions of sec. 1966—32, Stats. 1898. No certificate of the insurance commissioner showing the authority of the company to do business in this state was attached to the undertaking, nor was any certified copy of such certificate attached thereto, and it is claimed by the respondents that such certificate is an essential to the validity of the appeal. This contention is based upon the following statutory provisions: Sec. 3052, which requires the execution of an undertaking for costs by two sureties in order to render an appeal effectual for any purpose; sec. 3065, which provides that such undertaking shall be of no effect unless accompanied by the affidavits of the sureties, stating that they are worth double the amount of the undertaking above their debts and liabilities in non-exempt property; and sec. 1966—34, which provides, among other things, that the certificate of the insurance commissioner as to the authority of a surety company to transact business (or a certified copy thereof) shall be *equivalent* to the justification required of sureties by law. From these various provisions it is argued that the insurance commissioner's certificate becomes in such case, in legal effect, the justification, which is just as essential in case of an undertaking given by a surety company as is the affidavit or justification made by ordinary sureties in case of an undertaking signed by individuals. On the other hand, it is claimed by the appellant that sec. 1966—33, which is the section authorizing the execution of bonds and undertakings by surety companies, contains no requirement that they should be accompanied by the certificate of the commissioner, is complete in itself, and places the undertaking, when executed by a surety company, upon the same footing as an undertaking

executed by sureties who have duly justified. The question is certainly not as clear as might be desired, but in view of the evident intention of the legislature that the respondent should always be protected by a bond which should not only be sufficient, but should show its sufficiency upon its face, we hold that upon an undertaking of this kind the commissioner's certificate is required to be attached in order to make the appeal effective.

The appellant, while contending that the undertaking was perfect, presented at the same time a proper certificate from the insurance commissioner, and asked leave to attach the same to the undertaking in case the court should consider it necessary, under the provisions of sec. 3068, Stats. 1898. Undertakings upon appeal, which are defective on account of imperfect justification of the sureties, have frequently been allowed to be perfected by this court. *Helden v. Helden*, 9 Wis. 557; *Smith v. C. & N. W. R. Co.* 19 Wis. 89; *Ulrich v. Farrington Mfg. Co.* 69 Wis. 214. It was therefore ordered that the appeal be dismissed, unless the appellant within five days pay the respondents $10 motion costs, in which case the certificate presented might be filed, and the undertaking perfected. It appears that the terms imposed have been complied with, and consequently the appeal will be considered upon its merits.

Since the case was here upon the former appeal, a second substantive defense has been added to the defense made upon the previous trial, and this defense will be first considered. The policy provides that, in case of sickness of the horse, the insured "shall *at once* notify the company by telegram of the fact of such sickness; . . . otherwise, this policy shall be void." The additional defense now made is that this condition was never complied with, and that a verdict for the defendant should have been directed on this account.

We do not see how this contention can be satisfactorily met upon the evidence before the court. The fact was with-

out dispute that the horse was found to be sick in the morning of Sunday, November 5, 1893, and died in the afternoon of the same day, and that no telegram notifying the company of the fact was ever sent. The jury found such to be the fact, in answer to question 7 of the special findings.

It is true that the jury found, in answer to question 8, that *Johnston* could not, by the exercise of ordinary care and reasonable diligence, under the circumstances of the case, have sent a telegram to the defendant after he knew the horse was sick and before the animal died. There are two radical difficulties with this finding which render it practically valueless: First. It is unsupported by the evidence. The only evidence tending to show what steps were taken when the horse was discovered to be sick was that of the plaintiff himself, and was as follows: "The horse died on November 5, 1893, at Ontario, Wisconsin. I first noticed the horse was sick about half past seven in the morning. I gave the horse first a quart of linseed oil, and then either went or sent for Dr. Abbott, a physician of Ontario. He came and examined the horse, and treated him. He left two doses of medicine for him. One we gave him at the time, I think, and he told me some time in four or five hours to give him another one, which I did. He told me he thought the horse was in a bad condition, and advised me to procure some good veterinary. I sent for J. W. Snow, of Sparta, a veterinary surgeon. Had known him as a veterinary eight or nine years prior to that time. I wrote out a telegram for Snow, and directed the messenger to send it. It is not clear to me now whether he couldn't get the Sparta telegraph office, or the Norwalk office, but anyway the message was not sent, and he came on to Sparta, and got Snow, and Snow arrived at Ontario about dusk, or a little after, that evening. It is twenty-four or twenty-five miles to Sparta, I think. It is nine miles from Ontario to Norwalk. Wilton would be the nearest telegraph office to Ontario, but Norwalk is the

most practicable place. Norwalk is, I think, five or six miles nearer Sparta than Wilton. When Snow reached there, the horse was dead. The horse died probably at two or three o'clock in the afternoon, if my memory serves me right. . . . I don't think I gave any notice to the company of the sickness of the horse prior to his death." It appears from this evidence that Wilton was the nearest telegraph office to Ontario, where the horse was kept, and that Norwalk was the most practicable place, but it does not appear that it was impossible or impracticable to telegraph to the company from either place, and in fact it does not appear that any attempt was made to telegraph from either place or from Sparta. The messenger who was sent to telegraph for a veterinary surgeon was not put upon the stand. Second. Even if the finding were supported by evidence, it is insufficient to excuse the failure to telegraph the company. The agreement was absolute to telegraph to the company at once, not to use ordinary care or reasonable diligence to do so. In the event of failure to telegraph at once, the policy by its terms was avoided. This was an agreement in the nature of a promissory warranty, and if not strictly fulfilled there could be no recovery. Certainly, nothing short of impossibility of fulfillment could excuse a breach. Nor does it avail to say that its fulfillment would have done no good in this case. The parties chose to make it an absolute essential to the validity of the contract upon which the right of recovery depends. In effect, it is a promissory warranty, and the question as to its materiality or usefulness is not open. 3 Joyce, Ins. § 1962.

The remaining defense was the same as that urged upon the former trial, namely, a breach of the warranty as to the amount of the chattel mortgage upon the horse; it being claimed by the defendant that the mortgage to *Smith* upon the horse was in fact $800 instead of $500, as stated in the application. The evidence showed that *Johnston* bought

the horse of *Smith* in March, 1892, for $1,400, and at the time of the purchase, or soon after, paid $600 in cash of the purchase price, leaving $800 unpaid, for which *Smith* held a mortgage on the horse. During the year 1892 *Johnston* paid *Smith* various sums, amounting to more than $300, which he (*Johnston*) claims should have been credited on the mortgage. There were, however, other transactions between *Johnston* and *Smith*, upon which *Smith* claimed as due him over $300, and he (*Smith*) claimed to apply the said payments upon this outside indebtedness. This was the situation when the application for insurance was made. *Johnston* further claims that defendant's agent (Walton) filled out the application for insurance, and that when Walton asked him the amount of the incumbrance he said, "About $500," and that Walton wrote the answer in the application "$500." *Johnston* signed the application, but does not testify whether he read it or not. Walton denies that *Johnston* said, "About $500," and says that the answer was, "$500," just as it was written. By reference to the verdict, it will be seen that the jury found (1) that the amount of the incumbrance was in fact $525; (2) that *Johnston* stated to the agent that the mortgage was about $500; and (3) that this statement was merely a representation. Upon these findings the plaintiffs claim that the defense of breach of warranty as to incumbrances has been successfully avoided, and the trial court so held.

As to the first of these findings, namely, the finding that the amount of the incumbrance was $525, it must be said that it is absolutely unsupported in the evidence. It is a question of application of payments. It is familiar law that, where a debtor makes payments to his creditor to whom he is indebted on several different accounts, the debtor may apply the payment upon either account, as he chooses, and it must be so applied; but in the absence of such application by the debtor at the time of payment, or an agreement

by the creditor to so apply it, the creditor may make application of the payment upon such account as he chooses. We have searched the case in vain for evidence that *Johnston* made or attempted to make application of the payments in evidence upon the mortgage debt, and, on the other hand, the evidence, though meager, leaves no reasonable doubt but that *Smith* at once applied them upon the other indebtedness which he claimed against *Johnston*. This renders it clear that the amount of the incumbrance was $800 and interest, instead of $525, and the jury should have been so instructed.

Coming, now, to the question whether the statement in the application that the incumbrance on the horse was a warranty or merely a representation, we find that the evidence is no more extensive upon the question than upon the former trial; hence the propositions laid down upon the former appeal are *res adjudicata*, and must control the case in subsequent trials, whatever we might now think as to their soundness. Upon the former appeal (94 Wis. 117) it was said, in substance, that the statement in the application was on its face a warranty, but that if *Johnston* told the agent who wrote the application that he did not know the amount, but that it was "about $500," and the agent understood that it was not intended by *Johnston* to state the exact amount, but wrote it in that form in the application, without *Johnston's* knowledge or consent, it might well be that it should not be construed as a warranty, but as a representation merely; that this knowledge by the agent might estop the defendant to claim a warranty; that whether the statement in the application is properly a warranty or a representation is a question for the jury upon all the evidence bearing upon it; that if a warranty it must be strictly satisfied, but that if a representation a variance will not necessarily avoid the policy, in the absence of bad faith, unless the variance is substantial and material to the risk; and that

this is a question for the jury. These principles must be applied to the present record. As we have seen, the evidence showed without dispute that the amount of the incumbrance was $800 and interest, instead of $500, and hence the first question should have been answered by the court instead of being submitted to the jury to speculate upon. This left only two questions, namely: (1) Was the statement as to incumbrance a representation or a warranty? and, (2) If a representation, was the variance substantial and material to the risk? As to the first of these questions, the evidence before us does not, in our judgment, justify a finding that it was a representation merely. The plaintiff *Johnston* testified that he told Walton that the mortgage on the horse was about $500, and that he remembered nothing further that was said in regard to it. He does not now claim that he told Walton that he did not know the exact amount, but thought it was about $500. This was his testimony upon the previous trial, and it was upon this basis that it was said in the former opinion, in substance, that if he made this statement, and the agent understood that there was no intention of stating the exact amount, the knowledge of the agent might be the knowledge of the company, and estop the company from claiming a warranty. This element is lacking from the question as presented on this appeal, and it is a vital omission, because the former ruling was based on this consideration, namely, that plaintiff stated that he did not know the amount, and the defendant's agents thus knew he did not know the amount, and the company accepted the risk with this knowledge.

It certainly was not intended in the former decision to decide that if the insured said, "About $500," it would be a representation merely, but that if he said, "$500," it would be a warranty. This would be absurd. There must also have been a statement by *Johnston* that he did not know the amount, and knowledge by the agent that he did not

know it, and was not pretending to state it. There being no such statement now claimed, there is no evidence on which it can be found that the statement was a representation merely.

Being a warranty, there was no question as to its substantiality or materiality to be submitted to the jury. There was a clear breach, and the policy was avoided. Had it been a representation merely, we are unable to see how it could be held that a variance of $300 between the actual incumbrance and the representation could be held unsubstantial or immaterial to the risk, when the policy is but $800, and the real incumbrance is nearly double the amount of the one represented. We are not to be understood as reaffirming the abstract principles laid down upon the former appeal, but simply as applying them to the case because they are *res adjudicata.*

By the Court.— Judgment reversed, and action remanded for a new trial.

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107 348|
111 [1886]

THE STATE EX REL. SCHERMERHORN, Respondent, vs. MCCANN and others, Supervisors, Appellants.

September 4 — September 25, 1900.

Mandamus: *Disputed highways: Obstructions: Removal by supervisors.*

1. Where for more than thirty years controversy had existed as to the existence of a highway, and it had been customarily obstructed for upwards of twenty years, and the owner of the soil had in good faith insisted that the alleged highway had no legal existence, because the necessary proceedings to open it had not been taken, and such claim had been submitted to by the town officers for more than twenty years, and they had refused to remove obstructions thereto because of doubt as to whether the possession of the occupants could be successfully contested, *mandamus* will not lie to compel the town board to remove such alleged obstructions.

2. Sec. 1223, Stats. 1898, imposing upon town supervisors the duty of causing the highways in their towns to be kept free from obstructions to their use for public travel, requires summary action in reference to recognized highways only, and does not require them to decide *bona fide* disputes as to their existence.

3. Where the existence of a highway is fairly in controversy, that controversy must be determined by the courts and so determined as to bind the parties affected, before the supervisors are in duty bound to proceed summarily to remove obstructions under sec. 1223, Stats. 1898.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

Appeal from a judgment awarding a peremptory writ of *mandamus* commanding the supervisors of the town of Campbell, in said county, to remove obstructions from an alleged highway. The alternative writ of *mandamus* contained recitals to the effect that the relator was beneficially interested in the relief sought; that the highway in question was legally laid out September 5, 1860, and within four years thereafter was duly opened and worked and was thenceforth continuously used as a highway till about 1887, when one August Baier commenced to obstruct it; that for some time prior to the commencement of the proceedings for the writ, said Baier maintained such obstructions in such highway so as to wholly prevent its use. Recitals of like effect were in the petition for the writ, and others to the effect that the relator, before the date of such petition, demanded of the supervisors of the town that they perform their duty as such by removing the obstruction, and that they refused to comply with such demand.

The supervisors made return to the writ in the form of answer to the petition, to the effect, among other things, that no highway upon the line indicated in the order dated September 5, 1860, and relied upon by the relator, was ever opened, traveled, or worked, and that the purpose of having such highway was wholly abandoned; that the premises the

supervisors were required to clear of obstructions are the property of August Baier, and that he rightfully placed thereon the obstructions complained of; that Baier and his predecessors in title were, prior to the date of the writ, in possession of such premises for more than twenty years, during all of which time they maintained obstructions of the character complained of, and under claim of right. By the petition for the writ and the return thereto it was considered by the trial court that issues were raised as to whether the way, as laid out September 5 1860, was opened and worked within four years after such date; and whether the premises sought to be cleared of obstructions were within the limits of the highway as laid out. There was a finding of facts in favor of the relator, among other things, that he was specially interested in the controversy; that the highway in question was laid out, opened, and worked as alleged in the petition; that the use thereof was obstructed as alleged; that the relator demanded of the supervisors that they remove such obstructions, and that such demand was refused. Upon the facts so found, a peremptory writ of *mandamus* was ordered and judgment was rendered accordingly, from which this appeal was taken.

W. S. Burroughs, attorney, and *F. H. Bloomingdale*, of counsel, for the appellants.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*.

MARSHALL, J. In view of the conclusion arrived at in this case, an extended discussion of the evidence is not necessary, because whether it be so weak as to warrant a reversal upon the ground that the findings of fact are contrary to the clear preponderance thereof, as claimed by appellants, need not be determined.

The cause was made to turn, in the court below, on whether the laid-out highway was opened and worked within four

years from the date of the order establishing the same, and whether the premises obstructed were within the boundaries of such highway. There was evidence both ways on such questions. The burden was upon the respondent to establish the affirmative thereof. The evidence tending that way, as it reads in the record, is somewhat indefinite and uncertain, while there is much evidence to the contrary, including that of two surveyors, one called by each party, the only such witnesses who testified, both of whom made surveys and examinations of the situation before the trial; and also including two supervisors of the town, both of whom had been familiar with the old survey and the use of Baier's premises for travel since 1860, and one of whom assisted in making such survey. The evidence, as a whole, establishes beyond controversy that a dispute has existed since about 1864, respecting the existence of the alleged highway; that it was customarily obstructed for upwards of twenty years prior to the commencement of this action, by the owners of the premises in question acting in good faith under claim of right; that the present owner, firmly and in good faith, insists that the alleged highway has no legal existence, because the necessary proceedings to open it were not taken, and because its limits do not include the location of the obstructions complained of; that his claim of right in that regard, and that of his predecessor in the title, reaching back for more than twenty years, was submitted to by the officers of the town, and that they refused to remove such obstructions because of doubt as to whether Baier's possession can be successfully contested, and the belief that they would lay themselves liable to an action for trespass by going upon his premises and summarily maintaining the right of the public to the obstructed use of the alleged highway.

Now, in view of the situation as above set forth, the question is presented of whether it was proper to determine, in this form of action, the right involved and to compel the

appellants to go upon the premises in question and attempt to clear them of obstructions. Baier is not a party to the action. He is not bound by the judgment. If he be right in his position, the appellants would be trespassers the moment they attempted to carry out the commands of the writ awarded by the judgment appealed from, and he would have a right to treat them accordingly; and if he be not right, they would be compelled to establish that fact in expensive litigation against them as individuals, in which they would be liable to be defeated regardless of any judgment in this action.

The question suggested must be answered in the negative. A *mandamus* proceeding will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts, or where the legal result of the facts is a subject for reasonable controversy. If the right is reasonably in serious doubt, from either cause mentioned, the discretionary power rests with the officer to decide whether or not he will proceed to enforce it till the right shall have been established in some proper action; and that discretion, fairly exercised, cannot be controlled by *mandamus*. *State ex rel. Carpenter v. Hastings*, 10 Wis. 518; *State ex rel. La Valle v. Sauk Co.* 62 Wis. 376; Wood, Mandamus, 67, 68.

The law as indicated is firmly established and is particularly applicable where, if the officers were to attempt to do the act required by the judgment, it would involve them in uncertain litigation; and that alone is sufficient to answer the contention that they breached their official duty and laid themselves liable to this action. *State ex rel. Pfister v. Manitowoc*, 52 Wis. 427; *State ex rel. Lightfoot v. McCabe*, 74 Wis. 481; *State ex rel. Buchanan v. Kellogg*, 95 Wis. 672; *Townes v. Nichols*, 73 Me. 515; *Comm'rs of Highways v. People ex rel. Bonker*, 66 Ill. 339; *Brokaw v. Comm'rs*, 130 Ill. 482; *People ex rel. Fortune v. Pleasant Hill*, 67 Ill. App. 415; *Board of Education v. Spencer*, 52 Kan. 574; *State ex rel.*

Faires v. Buhler, 90 Mo. 560; *Rex v. Greame*, 2 Adol. & E. 615; Elliott, Roads & S. 517; Merrill, Mandamus, § 81.

In the last case cited, decided in the court of king's bench, the rule is stated thus: "We are not to subject the magistrate to risk by compelling him to perform an act where we see a legal probability that an action will be brought against him for doing it." In *State ex rel. Buchanan v. Kellogg, supra*, this court said: "It is not the province of *mandamus* to determine and adjudicate disputed rights, but to enforce undisputed rights." In *State ex rel. Faires v. Buhler, supra*, the Missouri court declares the law in effect as follows: If reasonable doubt exists as to the right, or the power of an officer to perform a duty in regard to it, *mandamus* will not lie to enforce such performance. It will not compel a road overseer to remove an obstruction from a road when the legal existence of the road is in doubt, especially if it be apparent that the interests of third persons, not before the court, are involved.

True, sec. 1223, Stats. 1898, imposes upon town supervisors the duty of causing the highways in their towns to be kept free from obstructions to their use for public travel, but that does not require them to decide a *bona fide* dispute as to the existence of the highway. That section, so far as it requires summary action by the supervisors, refers only to recognized highways. Where the existence of such a way is fairly in controversy, that controversy must be determined by the courts, and so as to bind the parties affected, before the supervisors are in duty bound to proceed summarily under sec. 1223. It follows that the trial court should have dismissed the *mandamus* proceedings.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the proceedings with costs.

THE STATE EX REL. RICE, Respondent, vs. CHITTENDEN and others, State Dental Examiners, Appellants.

107 354
110 [2]569
107 354
111 [1]384

September 4—September 25, 1900.

Mandamus: *Return: Demurrer: Costs: Practice.*

1. Where an alternative writ of *mandamus* ordered the state board of dental examiners to issue to relator a license to practice dentistry, or show cause, and a demurrer was interposed to that portion of the return which set out resolutions adopted concerning qualifications required by applicants for a license and establishing a standard for colleges whose diplomas would be recognized, and to another portion setting out evidentiary matters as to inquiries by the board regarding the standard of the college of which relator was graduated, the demurrer was *held* to be improperly interposed and sustained, since the portions demurred to were not set up as separate and distinct grounds why the defendants refused obedience to the writ, but are parts of one complete return, which, with the other matters set out, constituted the defense in the action.
2. An order sustaining a demurrer, which required the defeated party to pay $10 costs absolutely, is *held* erroneous. Such costs can only be required as a condition for pleading over.

APPEAL from an order of the circuit court for Monroe county: O. B. WYMAN, Circuit Judge. *Reversed.*

Mandamus. The relation sets out the facts which it is claimed entitle the relator to a license to practice dentistry in this state, and a wrongful refusal on the part of the defendants, who constitute the state board of dental examiners, to issue such license. An alternative writ was issued, to which the defendants made return, in which they set out at length their grounds for not obeying the writ. The twelfth subdivision sets out the adoption of certain resolutions by the board concerning the qualifications to be required of applicants for license, and establishing a standard for dental colleges whose diplomas should be recognized by the board. The thirteenth subdivision, among other things, sets out that the board, at a regular meeting, discussed the standing

and reputation of the college from which the plaintiff claims to have a diploma, and decided that, in their judgment, said college was not a reputable one, whose graduates would be entitled to license without examination. This is followed by some evidentiary matters as to further inquiries regarding the standing of this college, and what was done in that regard, and an allegation that relator was notified of their conclusions. The relator demurred to the whole of the twelfth subdivision, and to that portion of the thirteenth which set out the inquiries made as above stated. After a hearing of the demurrer, the court entered an order as follows: "It is ordered that the demurrer be, and the same is hereby, sustained. Further ordered that the defendants pay plaintiff $10 costs of said demurrer." Defendants duly excepted thereto, and have taken this appeal.

Joseph B. Doe, for the appellants.

For the respondent there was a brief by *Jones & Richards* and *Henry T. Sheldon*, and oral argument by *Mr. Sheldon.*

BARDEEN, J. This court held in *State ex rel. G. B. & M. R. Co. v. Jennings*, 56 Wis. 113, that a proceeding by *mandamus* was essentially a civil action, so far as the rules and practice as to pleadings were concerned, and that as to form and sufficiency the several pleadings must be governed by the same rules which prevail in other civil actions. This rule was recently reiterated and approved in the case of *State ex rel. Buchanan v. Kellogg*, 95 Wis. 672. Sec. 3451, Stats. 1898, provides that, whenever a return shall be made to any writ of *mandamus*, the person prosecuting the same "may demur or answer all or any of the material facts contained in the same return." Construing this statute to mean that a demurrer might be interposed to any material fact contained in the return, the relator demurred to certain paragraphs of the return, as not stating facts sufficient to

constitute a defense. The portions thus challenged are not set up as separate grounds why the defendants refuse obedience to the writ, but are parts of one complete return, which, with the other matters set out, constitute their defense to the action. It is a well-settled principle that a demurrer cannot be addressed to a fragmentary part of a pleading. 6 Ency. of Pl. & Pr. 300; *Shealy v. C., M. & N. R. Co.* 72 Wis. 471. Speaking of their statute relating to pleadings in cases of this kind, the courts of New York have said: "The relators had a right to demur to the return made to the alternative *mandamus*, but they could not both demur and plead. . . . The whole return is to be considered as entirety, like a count in a declaration. If the facts set forth cannot be traversed or denied, the relator may demur, but he cannot dissect the return into as many parts as he sees fit, and plead to some portions and demur to the residue." *Vail v. People*, 1 Wend. 38. But in this case we need not draw the line so closely. If a return sets up separate and distinct grounds for not obeying the alternative writ, no good reason is perceived why a demurrer may not be interposed to test its sufficiency in that particular, in analogy to the practice that permits a demurrer to one of several defenses, and in that regard the return would not be considered as an entirety. As covering the rule before stated, we quote from Wood, Mandamus, 27: "The people or the relator may demur to the return, or to any complete statement of facts therein separately assigned as a cause for disobeying the command of the writ, on the ground that the same is insufficient in law upon the face thereof." That portion of the return demurred to which relates to the adoption of certain resolutions by the defendant board, as well as the evidentiary matters relative to the efforts of the board to secure information as to the standing of the college granting relator's diploma, are not considered as being within the rule above stated, and hence the demurrer was improperly interposed and sustained.

The form of the order entered is erroneous. It requires the defendants to pay plaintiff $10 costs absolutely. Such costs can only be required as a condition for pleading over. *Schoenleber v. Burkhardt*, 94 Wis. 575; *Schroeder v. Richardson*, 101 Wis. 529.

This conclusion renders it unnecessary to consider the case on the merits.

By the Court.— The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

DABOLD, Appellant, vs. THE CHRONICLE PUBLISHING COMPANY, Respondent.

September 4 — September 25, 1900.

Libel and slander: Adulteration of butter: Violation of criminal statute: Moral turpitude: Pleading: Responsibility for libel.

1. An article in a newspaper charging plaintiff with selling without any license, a compound in imitation of pure yellow butter, which contained an admixture of foreign fat, is not libelous: neither secs. 4607*c*, 4607*d*, Stats. 1898, nor any other statute of Wisconsin, makes sale of imitation butter or of oleomargarine criminal or prohibited because sold without license from the state, nor can it be said that, independently of any such law, absence of license renders disgraceful or discreditable sales otherwise innocent.
2. An article in defendant's newspaper which charged that plaintiff had sold adulterated butter *as of pure creamery make*, that the commodity was forty per cent. butter and the balance grease, and that purchasers had been misled, is libelous. It charges deceitful dealing in adulterated or imitation butter, absolutely prohibited by sec. 4607*c*, Stats. 1898, which makes such acts a crime, and the acts so charged also involve moral turpitude in their perpetrator, both as an individual and as a dealer in commodities owing a duty of honesty and good faith to his customers.
3. Under sec. 2677, Stats. 1898 (providing that in case of libel it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the de-

famatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published concerning the plaintiff), an allegation that defendant published an article in its newspaper, charging the D. P. Co. (meaning plaintiff) with having sold adulterated butter as pure creamery make, is sufficient, on demurrer, to show that the acts charged referred to plaintiff.

4. In an action for libel, a positive allegation that the defendant falsely and maliciously caused to be printed and published in a certain newspaper a certain libelous article concerning the plaintiff, is sufficient, on demurrer, to charge defendant with such control over matter inserted in the newspaper as to make it liable therefor.

APPEAL from an order of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

Appeal from an order sustaining demurrer to complaint in substantially the following words:

"That the plaintiff is a produce merchant, and has been such produce merchant at the times hereinafter mentioned, with his place of business at La Crosse, Wisconsin. That on January 24, 1900, the defendant falsely and maliciously caused to be printed and published in the La Crosse Morning Chronicle, a daily newspaper published at La Crosse, Wisconsin, a certain libelous article of the plaintiff, and of the plaintiff in regard to his trade and business and in relation to his conduct therein, the words following:

"'BOGUS BUTTER.

"'*The Imitation Article is Found to be on Sale in This Town — Retail Merchants have been Selling the Stuff as the Real Thing — The Authorities at Madison are Analyzing a Number of Samples — State Law Regulating the Sale of such Products has been Violated.*

"'Adulterated butter has been sold in this city for some time past as of pure creamery make, and the imitation has been sold at the regular creamery prices.

"'Through a mere accident the stuff was discovered, and now there is no more to be had, not because the supply is

exhausted, but retail dealers who sold it have returned their stock to the wholesaler who has been handling it here.

"'The so-called butter has been shipped here from Armour & Company of Chicago, it is charged, and the Dabold Produce Company (meaning plaintiff) has acted as their local agents. A few days ago a regular customer of one of the suburban grocery stores discovered that the stuff sold him as butter was something other than the real thing. In spreading it on a peace of bread it resembled suet, and could be broken like a piece of cheese. He immediately notified the grocer, asking him if he had a license to sell that sort of stuff. The retailer was surprised to hear of such a condition of affairs, and informed *Mr. Dabold* (meaning plaintiff) of the matter. The latter says he will be responsible should there be any trouble over the matter.

"'Samples of the butter have been taken to three commission men in the city, one of whom says it contains only forty per cent. of butter and the balance is composed of grease. On Monday morning a sample was sent to H. C. Adams, of the state dairy and food commission, for examination, and an analysis will soon be sent back. In the meantime no more of the butter will be offered for sale.'

"'The selling of adulterated articles of this kind requires a license under the state law, and violators are subject to a heavy fine.'

"Meaning and intending thereby to charge plaintiff herein with the violation of sections 4607*c* and 4607*d*, Wisconsin Statutes, which said sections provide a punishment for any person who shall offer or expose for sale, or have in his possession with intent to sell, any article, product, or compound made wholly or partly out of any fat, oil, or oleaginous substance, or compound thereof, not produced from unadulterated milk, or cream from the same, and without the admixture or addition of any fat foreign to said milk or cream, which shall be in imitation of yellow butter produced from such milk or cream, with or without coloring matter, and

for the sale of the same without a license; and further meaning and intending to charge that the plaintiff was guilty of fraudulent, corrupt, and dishonest practices in his said business.

"And plaintiff further alleges that on the 26th day of January, 1900, the defendant herein falsely and maliciously caused to be printed and published in the said La Crosse Morning Chronicle a certain libelous article of the plaintiff, and of the plaintiff in regard to his trade and business and in relation to his conduct therein, the following words:

"'MORE ABOUT BOGUS BUTTER.

"'*The Analysis of Samples Sent to Madison Expected To-Day—Mr. Dabold Denies that He has Sold any of the Bad Butter.*

"'The announcement made in the Chronicle that bogus butter was being sold in this city has created considerable talk among commission men and retailers. The Chronicle obtained its information from a reliable source, and can back all the statements that have been made in this report. It is expected that an analysis of the samples of the so-called butter, which were sent to H. C. Adams, of the state dairy and food commission, will be received to-day or to-morrow, when it will be learned what portion of it is adulterated.

"'*Mr. Dabold* (meaning plaintiff) claims that he is not the local agent for Armour & Company, of Chicago, from whom it is said the butter was received, and that he buys all his butter from Minnesota. He also has sent samples of the butter in question to the food inspector for inspection.

"'There were no new developments yesterday, and probably nothing new will be learned until the record of Mr. Adams is received.' [Innuendo same as to previous publication.]"

For the appellant there was a brief by *Doherty & Baldwin*, and oral argument by *C. L. Baldwin*.

For the respondent there was a brief by *Fruit & Gordon*, and oral argument by *G. H. Gordon*.

DODGE, J. It is obvious that the pleader intended to point out by means of the innuendo three defamatory meanings, as conveyed by the published words: first, selling, or offering or exposing for sale, a compound in imitation of pure yellow butter, which contains any admixture of foreign fat,—a crime under sec. 4607*c*, Stats. 1898; second, selling the same without a license, erroneously claimed to be forbidden by secs. 4607*c* and 4607*d;* and, third, acting fraudulently and corruptly as a produce dealer in selling an adulterated commodity as pure.

The second of these alleged meanings may be dismissed at once, for neither the statutes referred to nor any other statute of Wisconsin makes sale of imitation butter or of oleomargarine criminal or prohibited because without license from the state, nor can it be said that, independently of any such law, absence of license would render disgraceful or discreditable sales otherwise innocent.

The published article is, however, clearly capable of conveying the defamation suggested by the other two innuendoes as against some one,— whether as against plaintiff will be considered later. Thus, it is alleged that adulterated butter has been sold *as of pure creamery make;* that the commodity is forty per cent. butter and the balance grease; and that both a customer and the retailer from whom he purchased were misled. This charges deceitful dealing in adulterated or imitation butter, absolutely prohibited by sec. 4607*c*, not, as respondent seems to surmise, a dealing in oleomargarine, which may be lawful and innocent if the regulations as to marking, etc., prescribed by sec. 4607*d* are complied with. The acts so charged also involve moral turpitude in their perpetrator as an individual, and especially as a dealer in such commodities, owing a duty of honesty and good faith to his customers.

More of uncertainty is involved in the consideration whether the publication in question may fairly be under-

stood as imputing the acts charged to the plaintiff. It is not for the court to decide on demurrer whether such is either the meaning or the understanding in fact of the words used, but only whether they are capable of such meaning, reasonably interpreted. If so, then the former question is for the jury. *Schild v. Legler*, 82 Wis. 73, 75; *Robertson v. Edelstein*, 104 Wis. 440, 443. No hesitation need result from the fact that reference is made to the Dabold Produce Company instead of the plaintiff by name, for the complaint expressly alleges that those words mean the plaintiff. Such allegation is sufficient, under sec. 2677, Stats. 1898, on demurrer, though, if controverted, it must be proved. This statute has relieved plaintiff from alleging extrinsic facts by way of inducement, which formerly might have been necessary, and has given to the innuendo increased force in alleging the application to plaintiff of the words used.

The article set forth is certainly capable of the construction that the imitation butter sold by the retailers was obtained by them from the plaintiff, called Dabold Produce Company, agent of Armour & Company, from whom it was shipped to La Crosse. That the retailers purchased in ignorance of the quality of the commodity is implied from the distinct allegation of the surprise of one of them when informed thereof by his customer. We are satisfied that the ordinary reader might well understand the article as asserting that the plaintiff was the source from which the "bogus butter" emanated, and that the pervading suggestion of deception was intended to apply to him, since in one instance, at least, the retailer is asserted to have been innocent, and to have been misled. So understood, the publication would be libelous.

2. It is objected that the complaint does not set forth any control by defendant over matter inserted in the La Crosse Morning Chronicle sufficiently to make it liable therefor, and *Simonsen v. Herold Co.* 61 Wis. 626, is invoked

as authority. That defendant maliciously caused the article complained of to be published is alleged positively, and without any qualification. This is sufficient on demurrer. A similar allegation was held insufficient in the above-cited case, because it was deemed to be qualified by further allegations of specific facts, and to be only the pleader's conclusion from such other facts, namely, that defendant Coleman was a principal proprietor of the Herold Company, which owned, controlled, and published the paper containing the libel, and was manager of the paper. These facts were held not sufficient to show that he controlled or was responsible for the matter printed therein. In the present case there is no such qualification or impairment of the direct allegation of defendant's responsibility.

The demurrer was erroneously sustained.

By the Court.— The order of the circuit court is reversed, and the cause remanded with directions to overrule the demurrer.

VILLAGE OF GALESVILLE, Respondent, vs. PARKER, Appellant.

107 363
109 601

September 5 — September 25, 1900.

Highways: Encroachments: Plats: Surveys: Ancient fences.

A fence having been erected by defendant on a line laid out by a surveyor as the proper location of the east line of the block in which his premises were situate, it appeared, in an action to compel the removal of the fence on the ground that it encroached on the highway, that, on the plat containing such block, there were no natural landmarks referred to; that the plat was imperfect and contradictory; and that no monument or original stake was in existence from which the lines of the original survey could be located; but the uncontradicted evidence as to the location of ancient fences, marking other lot and street lines in the same block, showed the line claimed by the plaintiff to be the east line of the

block as originally surveyed. *Held*, that such evidence could not be overcome by mere measurements of distances from the base line as shown by the plat, and that a judgment of removal of the encroachment was proper.

APPEAL from a judgment of the circuit court for Trempealeau county: O. B. WYMAN, Circuit Judge. *Affirmed.*

This is a proceeding brought under secs. 1330–1336 of the Statutes of 1898 by the trustees of the village of *Galesville* to compel the removal of an alleged encroachment upon the west side of Benton street, in said village, consisting of a wire fence built by the defendant, and intended by him to make the east line of lots 7 and 10 of block 19 of Gale's first addition to the village of *Galesville.* The village claimed that this fence projected into Benton street through its entire length a distance of ten or eleven feet, while the defendant claimed that it stood upon the true east line of said lots. The trustees made and served an order requiring the removal of the fence pursuant to sec. 1330, Stats. 1898. The defendant denied the alleged encroachment under sec. 1332, and the case came to the circuit court by appeal from the judgment of the justice, in which court it was treated as an original action, and judgment was rendered in favor of the plaintiff, from which the defendant appeals.

Many facts in the case were undisputed. The original plat of the village of *Galesville* was made and recorded in 1854, and was situated partially in the northwest quarter of section 33, and partially in the northeast quarter of section 32, in township 19, range 8, in Trempealeau county. In this plat a north and south street appears, called Benton street. In the year 1856 the plat of Gale's first addition to the said village was made and recorded, which last-named plat apparently joined on to the original plat on the west and south, and had for its east boundary the west line of said northwest quarter of section 33. In this last-named plat there is a block numbered 19, upon the east side of which appears a

street not named upon the plat, but apparently a continuation of Benton street in the original plat. Lots 7 and 10 in block 19 are located in the southeast corner of said block 19, and front on said Benton street. North of said last-named lots, in the same block, are lots 1 and 6, which also have a frontage on Benton street. Lots 7 and 10 were unoccupied and unfenced until about the year 1886, when the plaintiff purchased them; but lot 1 and certain other lots in said block were occupied and fenced for many years. Soon after the defendant purchased lots 7 and 10, a sidewalk was built in front of said lots by the village, and the defendant built a fence on what he supposed was the east line of lots 7 and 10, which fence was on the line with the old fence on the east line of lot 1. This fence and the sidewalk remained in position until the year 1893, and the sidewalk was used by the public continuously during that time. In the year 1893 the village employed a civil engineer named Bradish to make a survey, and to find the lines of block 19. In making such survey Bradish started from the quarter corner of the northeast quarter of section 32, which corner is the northwest corner of said addition according to the plat, and measured eastwardly through the blocks and streets marked upon the plat, using the distances named upon the plat as far as possible, and fixed the east line of lots 7 and 10 about eleven feet east of the former fence. No action was taken by the board upon this survey, but soon after it the village board ordered the defendant to build a new sidewalk in front of his premises. The defendant then moved his fence to the line marked by the Bradish survey, and the fence thus built is the encroachment complained of. Upon the side of the village it was shown that none of the original stakes marking the lines of block 19 or of other blocks in the addition were in existence, but that the ancient fences upon some of the other lots in block 19, and long occupation of said lots, coincided with the line of the fence built by *Parker* in 1886;

and that, if the lines of the block were readjusted according to the Bradish survey, they would all be thrown out of their old position ten or eleven feet. The engineer, Bradish, admitted that the plat of the addition was inconsistent, and that the courses and distances named upon the plat could not be made to agree, and that he found his lines by measurements only from the base line of the plat.

For the appellant there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*.

For the respondent there was a brief by *W. S. Wadleigh*, attorney, and *John C. Gaveney*, of counsel, and oral argument by *Mr. Wadleigh*.

WINSLOW, J. The question at issue in this case was simply, Where was the east line of block 19 located and marked upon the ground when the addition was originally surveyed and platted? The question was not where an accurate measurement of distances on the recorded plat would now locate the line, but, Where was it located originally? *Racine v. Emerson*, 85 Wis. 80.

Every stake in the plat originally set had disappeared. There were no natural landmarks referred to, and no monument or original stake was in existence from which the lines of the original survey could be located, unless we except the quarter corner at the extreme northwest corner of the plat, which was several blocks distant from block 19, and not connected therewith, either by monument or certain description. The plat itself is imperfect and contradictory; the width of some of its streets is not given, and its courses and distances are inconsistent with each other.

The rules by which the lines of such plats are to be ascertained are well settled. In the absence of natural boundaries or monuments, and of monuments or stakes set in the course of the original survey, the lines of ancient fences and long-continued occupation of adjacent lots and blocks in the same

plat, if evidently intended to mark the true lines of such lots and blocks, have greater probative force than mere measurements of courses and distances. *Racine v. J. I. Case P. Co.* 56 Wis. 539; *Racine v. Emerson, supra; Madison v. Mayers,* 97 Wis. 399. Especially is this true where, as in the present case, the courses and distances marked upon the plat are contradictory, thus making it ambiguous and uncertain.

In the present case the uncontradicted evidence of the location of ancient fences marking other lot and street lines in the same block showed that the line upon which the defendant built his fence in 1886 was unquestionably the east line of his lots, and hence was the west line of Benton street as originally surveyed when the plat was made. This could not be overcome by mere measurement of distances from the base line. The rule is salutary, and necessary to prevent the confusion and strife which would infallibly result if every ancient plat which had been practically located on the ground was subject to reconstruction and relocation by measurement of distances because the original stakes could not be found.

A verdict for the plaintiff might have been directed upon the uncontradicted evidence. The view which we have taken of the case renders unnecessary any consideration of the various errors assigned, because none of the rulings could affect the result.

By the Court.—Judgment affirmed.

107 368
s113 269

NEW HOME SEWING MACHINE COMPANY, Respondent, vs. SIMON, Appellant.

September 5 — September 25, 1900.

Appeal: New trial: Res adjudicata: *Guaranty: Conditional delivery: Waiver: Instructions to jury: Perverse verdict: Refusal to set aside: Abuse of discretion.*

1. Where, in an action on a letter of guaranty delivered on condition that another signer should be obtained, the supreme court decided that, when knowledge came to the plaintiff that the letter had been wrongfully delivered, it had no right to ignore the fact; that proceeding thereunder was at its peril; that unless the guarantor was guilty of some act that would amount to an estoppel, it was without remedy; and that the fact that its agent notified the guarantor that it would extend credit to H., whose obligations were thereby guaranteed, did not call for any protestation from him that he would not be bound thereby,— it was error for the trial court on a second trial, on substantially the same evidence, to instruct the jury that, if the defendant signed the letter and was thereafter notified of its acceptance by plaintiff, it thereupon became a binding contract of guaranty according to its terms; and that if defendant intended to insist upon the condition upon which he signed the letter, it was his duty to notify the plaintiff that he would not be responsible unless another signature was obtained.
2. Defendant having signed a letter of guaranty on condition that it should not be delivered until another surety was obtained, the principal delivered it in violation of such condition, and the guarantor, when notified by the guarantee's agent that credit would be extended on it, told such agent of the wrongful delivery. Thereafter the agent was permitted to take the letter away without protest. The guarantor called attention to the provision enabling him to withdraw therefrom if dissatisfied. He told such agent he thought it would not be necessary for him to do so as he had faith in his principal's business ability. Such agent thereafter frequently called on the guarantor, and they talked about how the principal was getting along in his business. *Held*, that there was no waiver of the guarantor's right to insist upon the effect of his notification of the conditional delivery.
3. The rule that, where a mistake is made in giving instructions to the jury, thereafter so fully corrected as to leave no reasonable ground

to say that they have been misled, or where an instruction upon a material point is susceptible of two constructions, one a correct statement of the law and the other not, but taking the charge as a whole there is no reasonable ground to say that the jury may have adopted and applied the latter, the error cannot be taken advantage of to reverse the judgment, does not relate to cases where the whole or some essential part of the controversy was covered by erroneous instructions requested by one party and then again covered by correct instructions requested by the opposite party; or to cases where conflicting instructions are given on material points, leading to uncertainty as to what rules of law are applicable to the case.

4. Where negotiations between the principal in a letter of guaranty and the guarantee, in regard to reducing the guarantor's liability from $2,000 to $1,000, were abandoned before notification of acceptance was given the guarantor, who was not a party to the negotiations and had no knowledge of the communications in respect thereto; and where on that state of the record, in a suit on such letter of guaranty, it was decided on appeal that what occurred in regard to a change of the guaranty was immaterial, such decision is *held* to rule adversely to the guarantor an assignment of error to the refusal of the trial court, on the second trial, to receive in evidence letters that passed between the guarantee and the principal in regard to such change.

5. Where the amount due plaintiff, if he is entitled to a verdict, is susceptible of being determined with mathematical accuracy, a verdict for plaintiff for a less amount shows that the cause was not fairly considered by the jury, and that the verdict was purposely and recklessly made regardless of the evidence.

6. In such case, where it is clear that such prejudicial misconduct has taken place, there is no room for the exercise of judicial discretion in disposing of a motion to vacate the verdict and grant a new trial.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

Action to recover on a guaranty which is as follows:

"La Crosse, Wis., August 27th, 1895.

"To THE NEW HOME SEWING MACHINE COMPANY,

"Chicago, Ill.

"Gentlemen,— For and in consideration of your company supplying R. L. C. Holbek, of La Crosse, in the county of

La Crosse, in the state of Wisconsin, with sewing machines and articles connected therewith, on credit, I do hereby guarantee the payment to you of the price and value of said goods at maturity, to an amount not to exceed two thousand dollars ($2,000.00), and whether the same be due on open account or by note or acceptance, and you are hereby authorized to grant such delay as you may see fit, for the payment of any sum which may be due you at any time, and this shall be held as continuing security in your favor until further notice from me, and to cover any and all renewals of debts, notes, or acceptances which may from time to time be made, and any interest or cost due thereon, and any balance which may at any time be due by said R. L. Holbek to your company.

"Signed this 27th day of August, 1895.

"MATHIAS SIMON."

The allegations of the complaint were, in substance, that plaintiff was entitled to recover the full sum mentioned in the letter of guaranty because of the default of the principal. The answer admitted the signature to the letter of guaranty and alleged that defendant signed it upon an agreement that another surety should be obtained thereto and that it should not otherwise be binding; that notice of the acceptance of such letter was never received; that by agreement between the principal named in the letter of guaranty and plaintiff, the liability under such letter was changed from $2,000 to $1,000, and that the alleged indebtedness of such principal, which, in any event, was covered by the guaranty, was much less than $2,000. The main question litigated on the trial was whether the letter of guaranty was conditionally signed to the knowledge of plaintiff, or whether it was modified as stated in the answer. Defendant testified that he signed the letter of guaranty with the express agreement that another surety should be obtained thereto, and that upon plaintiff's agent calling upon

him to obtain an acknowledgment of the genuineness of his signature to such letter, he said to him: "When I signed that bond I signed with the distinct understanding that there was to be another bondsman before the delivery of the bond." That evidence was disputed. Some letters were offered in evidence showing that prior to the conversation above mentioned, and after the letter of guaranty came to plaintiff's possession, it was agreed to limit the liability thereunder to $1,000, but it was thereafter agreed that the guaranty should stand as written. Such letters were received in evidence, their effect being limited to the question of conditional delivery. There was no evidence to show that defendant had any knowledge of the correspondence relating to a change in the contract of guaranty.

The court specially instructed the jury, at plaintiff's request, as follows: If you believe from the evidence 'that plaintiff notified the defendant that it accepted the guaranty as signed, and that it would thereafter sell to Holbek on the faith thereof, and if you further find that it did thereafter sell to Holbek on the faith of such guaranty, then the defendant is bound by his contract of guaranty to the plaintiff to the extent of such balance as may be due the plaintiff for sewing machines or sewing-machine supplies furnished on the faith of such guaranty, not exceeding $2,000, with interest from the date when demand was made upon defendant for payment thereof. If defendant, *Simon*, did not intend to be bound by the letter of guaranty after acceptance thereof unless there was another surety thereon, it was his duty to notify plaintiff that he would not be responsible on said letter of guaranty unless another surety signed the same.'

The jury were further instructed, at plaintiff's request: 'If you find that defendant did not notify plaintiff that another surety must be procured before he would be bound by the letter of guaranty, then he is bound under the letter

to pay for Holbek's purchases within the terms of such letter of guaranty, after September 9, 1895, for a sum not to exceed $2,000, with interest thereon from the date demand was made for payment thereof, provided you further find that plaintiff notified defendant of its acceptance of the letter of guaranty, and that it would furnish sewing machines and sewing-machine materials upon the faith and strength of it.'

The court further instructed the jury, at plaintiff's request: If you find that *Simon* said to plaintiff's agent, September 9, 1895, "When I signed that bond and Holbek brought it in, I signed it with the distinct understanding that there should be another bondsman when delivered," it is for you to say whether or not this is sufficient notice, providing the conversation which the defendant, *Simon*, claims did occur, to inform plaintiff that he did not intend, on the 9th day of September, 1895, to be bound by this letter of guaranty, and in determining this question you should take into consideration all that occurred between these parties at this conversation.

General instructions were given to the jury to the effect that if defendant, *Simon*, and plaintiff's agent understood, on September 9, 1895, that the letter of guaranty was to be a binding contract, plaintiff is entitled to recover. Further instructions were given as follows: "If you believe that *Mathias Simon* at the interview with plaintiff's agent on September 9, 1895, used the language he claims to have used, viz.: 'When I signed that bond and Holbek brought it in, I signed it with the distinct understanding that there must be another bondsman when delivered,' it is for you to say whether or not this language was sufficient to notify the plaintiff that he did not intend to be bound by the contract of guaranty, and in determining the question you should take into consideration the defendant's entire conduct and all other facts and circumstances in the case."

Each of the above instructions was duly excepted to.

The jury were further instructed, at defendant's request, substantially as follows: 'If the letter of guaranty was not designed to be a binding contract unless another signature thereto was obtained, and the plaintiff had notice of that fact or anything sufficient to put a reasonably prudent man on his guard in respect thereto, then the plaintiff cannot recover in this action.' 'If the letter of guaranty was conditionally left with the principal, and notice thereof was given to the plaintiff before it extended credit to such principal, the former had no right to sell goods to the latter relying on the guaranty, unless there was something in the talk or conduct of the defendant on September 9th which would have warranted the agent in believing that defendant did not intend to insist upon the invalidity of the instrument. The fact that the agent then notified the defendant that the plaintiff would extend credit to Holbek did not call for any protestation from him that he would not be bound by the letter of guaranty. When knowledge came to the plaintiff, if it did so come, that the letter of guaranty had been wrongfully delivered, it had no right to ignore the fact. It proceeded thereafter at its peril, and, unless defendant is guilty of some act that would amount to estoppel, is without remedy.' Instructions requested by defendant's attorneys, that the agreement shown to have been made between the plaintiff and the principal in the letter of guaranty subsequent to its coming to the latter's hands, limiting the effect of such letter to $1,000, avoided it unless such modification was subsequently done away with, were refused.

The undisputed evidence was that if the guaranty was binding according to its terms, defendant was liable thereon to pay about the full amount of the sum named therein, with interest. The exact amount was capable of being determined with mathematical accuracy. The verdict of the

jury was $1,000 and interest, making $1,358.74. Judgment was entered accordingly and defendant appealed.

For the appellant there was a brief by *Winter, Esch & Winter*, and oral argument by *Frank Winter*.

For the respondent there was a brief by *Fruit & Gordon*, and oral argument by *G. H. Gordon*.

MARSHALL, J. Upon the first appeal in this case (104 Wis. 120) one of the questions presented for decision was, Was it incumbent on defendant, when called upon by plaintiff's agent, September 9, 1895, and notified of its acceptance of the guaranty, to do more than merely say to the agent, in substance, that the paper was signed on condition that an additional guarantor would be obtained before delivery thereof to the guarantee? That is, Was it necessary, at that time, for the defendant to expressly notify the agent that he would insist upon the condition that an additional guarantor be obtained before the letter of guaranty should take effect as to him, in order to prevent a waiver of his right to insist upon such condition, thereafter, to defeat liability thereon? That was decided in the negative. The decision was expressed in such plain language that no room was left for a mistake in regard to the subject upon a new trial, if reasonable attention were paid to the opinion of the court. The language of such opinion was as follows: "The fact that the agent notified defendant that plaintiff would extend credit to Holbek did not call for any protestation from him that he would not be bound by the letter of guaranty. When knowledge came to plaintiff, if it did so come, that the letter of guaranty had been wrongfully delivered, it had no right to ignore the fact. It proceeded thereunder at its peril, and unless defendant is guilty of some act that would amount to an estoppel, is without remedy." Notwithstanding such decision, on the new trial, upon substantially the same evidence as that produced on the first trial, the learned circuit

judge, at the request of counsel for plaintiff, instructed the jury as indicated in the statement of facts, that if defendant signed the letter of guaranty and was thereafter notified of its acceptance by plaintiff, it thereupon became a binding contract of guaranty according to its terms; that if defendant intended to insist upon the condition on which he signed the paper, if there was such a condition, it was his duty to notify the plaintiff that he would not be responsible unless another signature was obtained to the paper. That was repeated and made so significant that the jury, looking alone to the propositions given to them at the request of plaintiff's counsel, were not left free to come to any other conclusion but that express notification by defendant to plaintiff's agent, of his intention to insist upon the conditional delivery of the paper, was essential to save him from liability thereon.

True, the court in the eighth instruction, requested by plaintiff's counsel, in form left it to the jury to say whether the statement defendant testified he made to plaintiff's agent was sufficient notice that he did not intend to be bound by the paper as signed; but if it was proper to submit that question to the jury at all, they were not left free to answer it from the evidence, having been previously instructed, in effect, that express notification by defendant to the agent was necessary, that an additional signature to the letter of guaranty must be obtained in order to give effect to his signature; and there was no evidence of any such notice. True it was said on the former appeal that if defendant notified the plaintiff's agent that the letter of guaranty was conditionally delivered, and such was the fact, plaintiff had no right to treat it as a binding contract unless defendant waived the condition by his conduct,— that is, did or said something, indicating that he did not intend to stand upon the conditional delivery, upon which plaintiff relied. What was there said respecting a waiver by defendant of the condition upon which he claimed to have signed the letter of

guaranty, was said, not because it was then thought there was anything in the record upon which a waiver could be based, but because it was supposed there might be evidence on that line on a second trial. The decision that the notice defendant said he gave, as to the circumstances of his signing and delivering the guaranty, sufficiently brought them to the attention of the plaintiff to be binding upon it, and that such situation could not be changed in plaintiff's favor except by proof of circumstances sufficient in law to estop the defendant from denying his liability, gave no warrant for submitting to the jury on the second trial the question of whether, admitting defendant's testimony to be true as to what he said, it was sufficient to bring to the agent's attention the fact of the conditional delivery. The court should have followed the decision of this court by instructing the jury that if they believed from the evidence that the conversation occurred between the defendant and plaintiff's agent, as testified to by the former, they should render a verdict in defendant's favor, unless they believed from the evidence that he indicated to such agent that he would waive the condition, and plaintiff relied thereon. The mere fact that the agent was permitted to take the bond away without protest, after the conversation mentioned, is of no significance, because that was consistent with defendant's attitude that he was willing to be bound if an additional signature was obtained. Neither was the fact, if it be a fact, that the defendant called attention to the provision in the bond enabling him to withdraw therefrom if dissatisfied, and that he told the agent that he thought it would not be necessary for him to withdraw as he had faith in Holbek's business ability; or the fact, if it be a fact, that the agent thereafter frequently called on defendant, and they talked about how Holbek was getting on in his business, of any special significance. Neither one nor all of such circumstances were sufficient to establish a waiver of defendant's

right to insist upon the effect of his notification to the plaintiff's agent of the conditional delivery of the letter of guaranty. They do not indicate that defendant expected that goods would be sold on the faith of his signature to the letter of guaranty till another guarantor should be obtained. The burden of proof to establish the fact of waiver was upon the plaintiff, and without some clear, definite evidence tending that way, the finding should have been made in appellant's favor by the court.

What has been said renders it unnecessary to discuss the general instructions given to the jury.

It is argued that because the law, as laid down in the former opinion, was correctly given to the jury, by instructions requested by appellant's counsel, the errors discussed were thereby corrected. Counsel cite *Middleton v. Jerdee*, 73 Wis. 44, and *Annas v. M. & N. R. Co.* 67 Wis. 63. Those cases are of a class that hold that, where there is a mistake made in giving the law to the jury, so fully thereafter corrected as to leave no reasonable ground to say that they have been misled to the prejudice of the appellant, or where an instruction upon a material point is susceptible of two constructions, one a correct statement of the law and the other not, but taking the charge as a whole there is no reasonable ground to say that the jury may have adopted and applied the latter, the error cannot be taken advantage of to reverse the judgment. They have no relation to such cases as this where the whole or some essential part of the controversy to be determined by the jury was covered by erroneous instructions requested by one party and then again covered by correct instructions requested by the opposite party; or cases where conflicting instructions are given on material points, leading to uncertainty as to what rules of law were applied to the case by the jury. In such a situation the losing party is generally entitled to a reversal of the judgment against

him, if proper proceedings be taken for a review of the error. *Imhoff v. C. & M. R. Co.* 20 Wis. 344; *Ward v. Henry*, 19 Wis. 76; *Little v. Superior R. T. R. Co.* 88 Wis. 402.

Errors are very liable to occur where the practice is followed of giving to the jury a number of propositions containing the law as claimed by the attorney on one side of the controversy and that is followed by a number of propositions submitted by opposite counsel containing the law as claimed by him, and general instructions are also submitted. It is a safer course for the trial judge to study the requests submitted with sufficient care to enable him to embody such as are correct in the general instructions, and to reject the rest. That course enables the court to submit to the jury the law point by point, in an orderly way, and the one best calculated to preserve harmony between the several subjects treated, and not confuse the jury as to the law on one point by reiterations of a principle in different language, not easily comprehended by a layman to be identical in meaning.

Error is assigned because the court received in evidence letters that passed between Holbek and plaintiff prior to the acceptance by plaintiff of the guaranty, September 9, 1895, relating to a change in such guaranty from two to one thousand dollars, and so restricted the effect of such evidence as to exclude the letters so far as they were proof of such change. The evidence on the second, as on the first, trial shows that all negotiations and all arrangements regarding a change in the guaranty took place before it became effective, if it ever did, by notice to the defendant of plaintiff's acceptance; that before such acceptance it was agreed between Holbek and plaintiff that the guaranty should stand as written; and that defendant was not a party in any way to, and had no knowledge of, the communications between plaintiff and Holbek. On that state

of the case it was decided on the former appeal that what occurred in regard to a change of the guaranty was immaterial. That rules the assignment of error under consideration adverse to appellant.

Error is assigned because the court permitted the verdict of $1,000 to stand, there being no evidence to warrant a finding, except either of no cause of action, or of substantially the full amount claimed by plaintiff, indicating that the cause was not fairly considered by the jury, and that the verdict was purposely or recklessly made regardless of the evidence. It needs no argument or citation of authority to justify the conclusion that such a verdict ought not and cannot be permitted to stand. It should have been set aside by the trial court without hesitation. This is not a case where the jury was called upon to assess mere unliquidated damages. If plaintiff was entitled to a verdict, the amount of it was susceptible of being determined with mathematical accuracy. A verdict showing that the evidence, and the law as given by the court, were wholly disregarded by the jury as to an essential fact of the case, leaves it doubtful whether they considered and decided, upon the evidence, as to any question upon which defendant's liability depended. Juries have no power to guess away or arbitrate the rights of parties. Their duty is strictly limited to finding the facts from the evidence and applying the law thereto as given to them by the court. Litigants are entitled to an intelligent, fair consideration by them of questions submitted, and where it is clear that prejudicial misconduct has taken place, as in this case, there is no more room for the exercise of judicial discretion in disposing of the motion to vacate the verdict and grant a new trial, than there is for a jury to dispose of the rights of parties regardless of the evidence. *Waufle v. McLellan*, 51 Wis. 484.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

BAIER, Appellant, vs. HOSMER and others, Supervisors, Respondents.

September 6 — September 25, 1900.

Highways: Lands excluded from access: Filing order: Payment of advantages assessed: Payment to town chairman: Mandatory statute.

1. Construing sec. 1275, Stats. 1898 (providing that, whenever the supervisors of a town shall lay out a highway to lands excluded from access to any other highway, the amount assessed as advantages against the applicant shall be paid to the town treasurer before the order laying out such highway shall be filed), in connection with the provisions of sec. 1269 that the order laying out such highway, together with the award of damages, shall be filed within ten days after the day fixed for deciding on the application, no legal filing can take place until such assessment has been paid. Hence, in such a proceeding, where the advantages assessed against the applicant were not paid to the town treasurer until thirteen days after the hearing, the supervisors are deemed to have decided against the application. *State ex rel. Giblin v. Sup'rs of Union*, 68 Wis. 158, followed.
2. The provisions of sec. 1275, Stats. 1898, that, on laying out a highway to lands excluded from access to any other highway, the advantages assessed against the applicant shall be paid to the *town treasurer*, are mandatory: it is not a substantial compliance with the statute to pay the sum assessed to the *chairman of the town board*.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

An action to enjoin the defendants from opening a highway of necessity over lands of the plaintiff for access to the lands of one Louis A. Miller, upon whose application and upon notice hearing was had pursuant to sec. 1275, Stats. 1898, on the 13th day of October, 1899, as to the necessity of such road. On the tenth day after said hearing, to wit, October 23, 1899, the defendants as supervisors made and signed an order for the opening of said highway, assessing $20 advantages upon the applicant, Miller, and awarding

$20 damages to the plaintiff. On the same day the applicant, Miller, paid $20 to the chairman of the town board, who tendered it to the plaintiff. He refused it. Thereupon, on said 23d day of October, the town board filed said order with the town clerk, but the chairman of the board, having no convenient opportunity, did not pay over said $20 to the town treasurer until October 26th, thirteen days after the day of hearing. From judgment dismissing the complaint on the merits, plaintiff appealed.

For the appellant there was a brief by *Wm. S. Burroughs*, attorney, and *F. H. Bloomingdale*, of counsel, and oral argument by *Mr. Burroughs*.

For the respondents there was a brief by *Higbee & Bunge*, and oral argument by *G. W. Bunge*.

DODGE, J. The conclusion reached upon one of the questions presented renders unnecessary consideration of other contentions urged by the plaintiff against the opening of the highway in question. It is provided that the applicant for the opening of a highway to lands excluded from access to any other highway, under sec. 1275, Stats. 1898, shall pay the amount assessed as advantages to the town treasurer before the order laying out such highway shall be filed. Upon full consideration, it was decided in *State ex rel. Giblin v. Sup'rs of Union*, 68 Wis. 158, that this provision was to be read in connection with those of sec. 1269, Stats. 1898, viz.: "Such order, together with the award of damages hereinafter mentioned, shall be so filed within ten days after the day fixed by their notice or adjournment for deciding upon such application; and in case said supervisors shall fail to file such order and award within the ten days aforesaid they shall be deemed to have decided against such application;" that, so read, the statutes resulted in the proposition that no legal filing could take place until the applicant, under sec. 1275, had paid the assessment against him; and that, if he neglected to do so until the expiration

of the ten days, the result specified in sec. 1269 was attained, namely, a decision against his application. That situation is here presented. The advantages assessed against the applicant, Miller were not in fact paid to the town treasurer until thirteen days after the time of hearing, and we must hold, upon the authority of the above-cited case, that the supervisors are deemed to have decided against, instead of in favor of, his application.

Respondents urge that sec. 1275 is substantially complied with by applicant's payment to the chairman of the town board of the sum assessed, but with this contention we cannot agree. The statute is mandatory that the payment shall be made to the town treasurer, an officer upon whom the law casts specific duties, and in whose hands the money is by law protected for the benefit of the person to whom damages are awarded. A payment to the chairman of the town board is wholly unauthorized by law, and in no wise satisfies the statute. The receipt by such officer can only be in his individual capacity. The law places upon him no duty with reference thereto, and no liability for any misapplication thereof. He could, during any of the period that said money was in his hands, have returned it to the applicant without thereby incurring any responsibility either to the town or to the plaintiff. The requirements of sec. 1275 must be strictly complied with, and cannot be satisfied by what may seem either to the applicant or to the court equivalent.

From these views, it results that no authority exists in the respondents, as supervisors of the town, to open the highway in question; and as their threat to do so is imminent, and the injury therefrom of a character to impose irreparable injury upon the plaintiff, incapable of adequate remedy at law, they should have been enjoined from proceeding.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment in accordance with the prayer of the complaint.

THE PROVIDENT LOAN & BUILDING ASSOCIATION OF LA CROSSE, Respondent, vs. CARTER and another, Appellants.

September 6 — September 25, 1900.

Building and loan associations: Mortgages: Application of payments: Ultra vires: ***Estoppel: Subsequent incumbrancer: Notice: Recording act: Marshaling funds: Laches: Default in payments: Premature commencement of action.***

1. A building and loan association, on making a loan to C., took a mortgage on real estate, and also an assignment of C.'s shares of stock, for security. C. executed a second mortgage on said real estate to the defendant M., and thereafter the association, in ignorance of M.'s mortgage, made a second loan to C. and took an assignment of the equity in C.'s stock as security. *Held*, that M. had no absolute right to have the value of C.'s stock applied in payment of the plaintiff's mortgage.
2. In such case C. cannot question the authority of the association to make the loan; as a member of the association he was bound to take notice of the limitations upon its power, and, having assented to the transaction, he is estopped from contesting it.
3. In such case the making of the second loan was not *ultra vires*, it being within the general powers of the association.
4. A building and loan association made a loan to C., who was a member, and took a mortgage on his real estate and an assignment of his stock as security, and afterwards made a second loan on the security of the equity C. had in his stock. *Held*, that M., a second mortgagee, could not question the authority of the association to make the second loan: M.'s rights must be tested by his status as a subsequent incumbrancer of mortgaged property, unless he gave the association notice of the existence of his mortgage before the second loan was made.
5. In such case the record of the second mortgage was not notice thereof to the association. The recording act applies only to subsequent purchasers or incumbrancers.
6. Where plaintiff has security on two funds and defendant upon one of them, and, without notice that defendant has any interest in either, the plaintiff in good faith disposes of the fund upon which defendant has no claim, the laches of the defendant precludes him from insisting that plaintiff shall first exhaust his remedy against the fund upon which defendant has no security.

7. Where the by-laws of a building and loan association provided that, in case of nonpayment of instalments of interest or premium by borrowing stockholders *for the space of six months*, proceedings might be taken on the bond or mortgage to collect the same according to law, and it was admitted that all payments on defendant's bond and mortgage, which required payments to be made on or before the second Monday of each month, had been made to and including that which became due the second Monday of March, the first default occurred on the second Monday of April, and an action commenced September 21 following was premature.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

The plaintiff is a loan and building association organized under the laws of this state. In April, 1889, the defendant *Carter* applied to the plaintiff for a loan. He then subscribed for twelve shares of the eleventh series of stock, which commenced on the second Monday of February of that year. On April 15th he executed the mortgage in suit to secure a bond conditioned to pay plaintiff $600 at or before the maturity of the eleventh series of stock, with six per cent. interest from April 8, 1898, payable monthly on or before the second Monday of each month, in advance. At the same time he made an assignment of his stock as collateral security for his debt. The matured value of stock was $50, and according to the rules of the company defendant's payments on stock and for interest and premium amounted to $8.40 per month. The defendant kept up and made his payments regularly up to and including the one which became due on the second Monday of March, 1899. He then defaulted, and this action of foreclosure was commenced on September 21, 1899. The defendant *Carter* answered, alleging payment of all dues and interest up to and including the month of May, 1899, and alleged that, according to the by-laws of the company and its charter, there was only $42.96 due on the mortgage. The defendant *Mueller* was made a party as a subsequent incumbrancer. It appears

from his answer that April 24, 1896, the defendant *Carter* executed a second mortgage upon the premises for $1,500 to the G. Heilman Brewing Company, which was assigned to *Mueller* in May following. His answer sets up the existence of his mortgage, that *Carter* is in default, and that a suit to foreclose has been commenced. He also sets up payment of plaintiff's mortgage except $50. The defendant *Carter* claimed that the action was prematurely brought, six months not having elapsed between the time of his default and the commencement of the action. The issue was tried, and found adversely to defendant.

Upon the trial of the case on its merits it appeared that on July 16, 1898, the plaintiff made a further loan to *Carter* of $600 upon his promissory note, and took as security therefor an assignment of his equity in the twelve shares of stock already pledged as security for the first loan. On the date this suit was commenced *Carter's* stock is said to have been worth $569.04, and this amount was applied upon the last loan. The court made findings that the allegations of the complaint were proven and true, and that the allegations of the answer were not true; that no payments had been made upon the bond and mortgage in suit except as mentioned in the complaint, and that there was due thereon for principal and interest $658.06; also that at the time the second loan was made to *Carter* the plaintiff had no notice of the second mortgage, now held by the defendant *Mueller*. The usual judgment of foreclosure and sale was ordered. The defendants *Carter* and *Mueller* have appealed.

For the appellants there were separate briefs by *Miller & Wolfe*, attorneys for *Mueller*, and *John A. Daniels*, attorney for *Carter*, and oral argument by *W. F. Wolfe*.

Martin Bergh, for the respondent.

BARDEEN, J. 1. The defendant *Mueller* bases his argument that the judgment should be reversed upon the claim

that, as a subsequent mortgagee, he had an absolute right to have the value of *Carter's* stock applied in payment of the plaintiff's mortgage. The plaintiff had no dealing with him. It had no actual knowledge of the existence of his mortgage. It owed him no duty except such as the law requires between parties having successive claims upon the same property. When plaintiff took its mortgage, it also took an assignment of the mortgagor's stock as further security. Later, and after the defendant had taken the second mortgage, it loaned *Carter* more money, and took as security an assignment of his equity in such stock. When the loan became due and *Carter* had defaulted on his stock payments, it applied the value of his stock in liquidation of his last loan. Some question is made by both defendants that the plaintiff had no authority to make this loan. As to the defendant *Carter*, this contention comes with very poor grace. He was a member of the association, and bound to take notice of the limitations upon its power, and, having assented to the transaction, he is foreclosed from contesting it. *Leahy v. Nat. B. & L. Asso.* 100 Wis. 555–566. But the transaction was not *ultra vires*. It was within the scope of its general powers; and, even if the security may be deemed inadequate, *Mueller*, an outsider, cannot complain. His rights must be tested by his status as a subsequent incumbrancer of the mortgaged property. Unquestionably, if he had given plaintiff notice of the existence of his mortgage before the second loan was made, the status then existing between it and *Carter* could not have been changed to his prejudice. We agree with the finding of the court that plaintiff had no such notice. The record of the mortgage was not such notice. The recording act has no application to the situation. That applies to subsequent purchasers or incumbrancers. We then have this condition of things: Plaintiff had security on two funds; defendant upon one of them. The rule ordinarily would be that defendant could

require the plaintiff to exhaust his remedy against the fund upon which he had no security. But without notice that defendant had any interest in either, the plaintiff disposed of the fund upon which defendant has no claim. The transaction was in good faith. Without notice, plaintiff was free to deal with its stock in any way it pleased. Hence the laches of *Mueller* precludes him now from insisting that the value of *Carter's* stock shall first be applied in satisfaction of the plaintiff's mortgage.

2. We will now consider the question of whether this action was prematurely brought. Sec. 3, art. 7, of the plaintiff's by-laws is as follows: "In case of nonpayment of instalments of interest or premium by borrowing stockholders *for the space of six months*, the directors may compel payment of principal and interest, premiums and fines, by proceeding on the bond or mortgage to collect the same according to law." This by-law was expressly made a part of defendant's mortgage. By the terms of the bond, payments were to be made on or before the second Monday of each month. The bond also contained the following provision: "Provided, however, and it is hereby expressly agreed, that if at any time default shall be made in the payment of the said principal money when due, or in the payment of the said interest or of the said monthly premium, for the space of six months after the same or any part thereof shall have become due, or should the said stock upon which this loan is made be sold for the nonpayment of dues," etc., the whole amount should become due, and payment could be enforced at once. It is admitted that all payments were made up to and including the payment that became due on the second Monday of March, 1899, and that such payment kept the loan current until the second Monday of April of that year. This suit was commenced September 21, 1899. The defendant *Carter* claimed that payments had been made for April and May, but upon the evidence presented the court found against

him. This leaves the question fairly presented whether, at the time this suit was brought, he was in default "for the space of six months" after his payments became due. The first payment for which he was in default became due on the second Monday of April. The plaintiff argues, and the court so found, that when the defendant defaulted in the April payment he then became one month in default, and that when he failed to make payment on the second Monday of September he was six months in default, and thus the calls of his contract have been met; in other words, if the defendant defaulted in six payments, he then became six months in arrears, within the terms of the contract. If this was the result intended, the plaintiff was singularly unfortunate in the wording of its by-laws. According to the plain letter of the provision, the principal sum did not become due until stock and interest payments had been due "for the space of six months." Nothing is said about default in six monthly payments. The language used is too plain for construction. It means that six months must elapse from the time of the default before the cause of action ripened. This was their contract, and upon it they must stand. It being conceded that the first default occurred on the second Monday of April, the full space of six months must elapse thereafter before a suit could be rightfully commenced. Hence the commencement of a suit before October was premature.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the action.

LA CROSSE CITY RAILWAY COMPANY, Appellant, vs. HIGBEE, Respondent.

107 389
107 511
107 389
109 588

September 6 — September 25, 1900.

Electric street railways: Additional burden to fee: Streets: Rights of abutting owners: Trolley-wire pole: Right of city to authorize use of street for such poles.

1. The rule as to whether a street railroad is an additional burden on the fee title to the street on which it is located, established in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, applies to street railroads operated by electric power communicated by means of a trolley wire supported over the track by cross wires attached to poles set in the streets near the outer edge of the sidewalk lines, so far as the construction and operation of such roads fall within the principle of such case.
2. The doctrine of *Krueger v. Wis. Tel. Co.* 106 Wis. 96, namely, that any new use of a street which to any extent requires a permanent occupancy thereof is an additional burden on the fee, applicable to telephone lines, does not apply to electric street railroads, because such railroads are but an improved method of using the street to effect its original design. The two doctrines divide on whether the use of the street is new, having regard to the original purpose thereof, or the use is only a new mode of devoting the street to public travel, its original purpose.
3. The principle of *Hobart v. Milwaukee City R. Co.* may be stated as follows: A railroad constructed on the grade of a street and operated so as not to materially interfere with the common use thereof for public travel by ordinary modes, or with private rights of abutting landowners, and for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden on the fee thereof.
4. A railroad satisfies the above essentials, regardless of the motive power used or how it is applied, if it be strictly a street railroad for the carriage of passengers on the street, taking them on and discharging them at reasonable points, and it be so constructed and operated as not to materially interfere with the ordinary modes of using the street for public travel or with private rights.
5. A supporting trolley-wire pole, set in a street in front of the sidewalk, does not violate the above rule if it be placed with reasonable regard for the convenience of the owner of the fee of the land on which it is located, and so as not to materially interfere with access to his lot outside the street line.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for La Crosse county: R. G. SIEBECKER, Judge. *Reversed.*

Action to enjoin the defendant from cutting down an electric street railroad pole, which was erected in the usual way at the outer edge of the sidewalk on his property, on one of the streets of the city of La Crosse, Wisconsin. Sufficient facts are properly stated in the complaint to constitute a good cause of action against the defendant, if electric street railroad poles may be legally placed in a city street, when so located as not to materially interfere with public travel, or access to and egress from abutting property, without the consent of the owner of such property, or his being compensated for a taking of his property for the public use. The defendant interposed a general demurrer to the complaint, which was sustained, and plaintiff appealed.

For the appellant there was a brief by *Losey, Woodward & Lees*, and oral argument by *G. M. Woodward.* To the point that the pole in question imposed no additional burden on the fee title to the street, they cited *Williams v. City E. St. R. Co.* 41 Fed. Rep. 556; *Ogden City R. Co. v. Ogden City*, 7 Utah, 207; *Taggert v. Newport St. R. Co.* 16 R. I. 668; *Lockhart v. Craig St. R. Co.* 139 Pa. St. 419; *Koch v. North Ave. R. Co.* 75 Md. 222; *Halsey v. Rapid Transit St. R. Co.* 47 N. J. Eq. 380; *San Antonio R. T. St. R. Co. v. Limberger*, 88 Tex. 79; *Railway Co. v. Telegraph Asso.* 48 Ohio St. 390; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *People ex rel. Kunze v. Fort Wayne & E. R. Co.* 92 Mich. 522; *Dean v. Ann Arbor St. R. Co.* 93 Mich. 330; *Howe v. West End St. R. Co.* 167 Mass. 46; *Kennelly v. Jersey City*, 57 N. J. L. 293; *Canastota K. Co. v. Newington T. Co.* 69 Conn. 146; *Merrick v. Intramontaine R. Co.* 118 N. C. 1081; *Philadelphia, W. & B. R. Co. v. Wilmington C. R. Co.* 38 Atl. Rep. 1067; *Birmingham T. Co. v. Birmingham R. & E. Co.* 119 Ala. 137; *Placke v. Union Depot R. Co.* 140 Mo. 634; *Chicago, B. & Q. R. Co. v. West Chicago St.*

R. Co. 156 Ill. 255; *Cumberland T. & T. Co. v. United Electric R. Co.* 93 Tenn. 492; *Snyder v. Fort Madison St. R. Co.* 105 Iowa, 284; *Chicago & C. T. R. Co. v. Whiting, H. & E. C. St. R. Co.* 139 Ind. 297; *Taylor v. P., K. & Y. St. R. Co.* 91 Me. 193; *Carter v. Northwestern T. E. Co.* 60 Minn. 539; *Palmer v. Larchmont E. Co.* 158 N. Y. 231; *Tompkins v. Hodgson*, 2 Hun, 146.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee.*

MARSHALL, J. The decision appealed from, as we are informed, was made on the theory that the case is controlled by the conclusion reached in *Krueger v. Wis. Tel. Co.* 106 Wis. 96, regarding the right to maintain telephone poles in public highways without the consent of abutting property owners, and the reasoning that led to such conclusion. Counsel for respondent urge the same view in this court, so we are confronted at the outset with the question of whether the point now presented has been in effect decided and the law in regard to it established for this state against appellant's contention to the effect that an electric railway pole in a city street, properly placed, is not an additional burden upon the fee title to the land over which the street is laid.

We shall not discuss at any great length what was said in the *Krueger Case*, for the purpose of explaining and rendering the reasoning of the opinion there more clear and consistent with the conclusions reached here than they seem to have been to counsel for respondent and to the learned court that decided this case below. If there exist any necessity for making the opinion in the *Krueger Case* more definite and certain, it is not perceived here. What was said there should be read and considered with reference to the points decided, upon which the final decision was grounded. Such points are, first, the law governing the

right of telegraph and similar companies to erect and maintain poles and lines on public streets and highways, does not extend beyond the public right to the street, hence is subject to the private rights of the owners of the fee of the land covered by the streets, who must be dealt with independent of such law, if such poles constitute an additional burden upon such fee; second, as regards the contingency suggested, as between the rule in jurisdictions holding that any *quasi*-public use of a street is permissible that is not so inconsistent with the original design thereof as to materially interfere therewith, under which telephone and telegraph lines in public streets have been held not to be an additional burden upon the fee, and the rule adopted by the great majority of courts and supported generally by law writers,— that a new mode of using a public highway so wholly different from the original mode of use as to really constitute a new use affects private rights, though such use may in some degree affect the original design of the way, if it requires to some extent a permanent occupancy of the street, regardless of whether such occupancy materially interferes with the primary use of the street,— under which rule the maintenance of telegraph and telephone poles on public streets has been held to be an additional burden on the fee, for which the abutting owner must be compensated, the court inclines to and adopts the majority rule above, so far as relates to telephone lines. That course was followed, as was remarked, in view of the fact that the latter rule has the greater support, as indicated, and the further fact that a middle ground for street railways was adopted for this state in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194. All said in the opinion as to permanent occupancy of a street by a *quasi*-public corporation, for a purpose not originally contemplated in the acquirement of the land covered by it for public use, being of itself a new burden upon the fee thereof, was said *arguendo*, and as mere

backing for the extreme rule in favor of abutting property owners, adopted as to telephone lines, but which, as indicated in the opinion, has been, since the *Hobart Case*, contrary to the policy of the state regarding street railways, as the opinion clearly shows.

So, as we have seen, there is nothing in the *Krueger Case* when rightly understood, and when, we may properly say, understood as the language of the opinion clearly indicates, to affect the question raised in this case. That is all we deem necessary to say regarding the *Krueger Case*. It established the law for this state, governing the question presented for decision and decided, and the opinion should not be read as in any way limiting the law regarding street railways, laid down in the early case in this court.

From what has been said this case is left to turn on whether a street railroad pole, properly placed, is an additional burden on the fee of the land upon which it is located, within the principle of *Hobart v. Milwaukee City R. Co.* Such principle, briefly stated, is that a railroad, constructed and operated in the street of a city at grade, so as not to materially interfere with its common use for public travel by ordinary modes, or with private rights of abutting landowners, for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden upon the fee thereof.

In *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co.* 95 Wis. 561, the court pointed out the significance of the purpose of a street railway as indicated in the rule under consideration, namely, the carriage of passengers; also the significance of the place where such purpose may be exercised, namely, in city streets; and it was held that a railway having for its purpose the carriage of freight, a commercial railway, is not covered by the *Hobart Case*.

In *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83, the significance of that part of the rule of the *Hobart Case* rel-

ative to where a street railway may be constructed was again pointed out and discussed, and it was held that it does not extend to a purely country highway. So it will be seen that the law governing the subject under discussion, as laid down when first considered in this court, has not since been extended or limited. No reason is perceived and none contended for, as we understand it, why such law should now be extended. The issue raised must be tested accordingly.

It is claimed by appellant that no significance should be given to the fact that in the *Hobart Case* the motive power was obtained by the use of horses, while the contrary is urged by counsel for the respondent, attention being called to the following language of the chief justice in *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co., supra:* "There is certainly far more difference in the use of mere horse power, as in *Hobart v. Milwaukee City R. Co., supra,* and electric power, as in the case of the defendant, than there is in the case of electricity and steam." When that language is read with reference to the point under consideration it will be seen that it was not intended to convey the idea that the difference between horses as a motive power and electricity is sufficient to render a street railroad an additional burden upon the fee of the land on which the street is located. The question to which the quoted language referred is, Why should an ordinary steam commercial railroad company be required to pay for its right of way in the public streets, to the owner of the fee of the land upon which the railroad is constructed, and an electric street railroad company be free from that burden? The mere difference in motive power would seem to be insufficient, it was said; and as a further reason why mere motive power should not be the test, the idea was suggested expressed in the language which counsel for respondent deem so significant. What would be fairly gathered from all that was said on the subject is that the motive power, of

itself, is not sufficient to class an electric street railway with an ordinary railroad, as regards its being an added burden upon the fee. That is in line with all or nearly all authority on the subject. *Williams v. City E. St. R. Co.* 41 Fed. Rep. 556; *Jaynes v. Omaha St. R. Co.* 53 Neb. 631; *Louisville B. Mfg. Co. v. Central P. R. Co.* 95 Ky. 50; *Roebling v. Trenton P. R. Co.* 58 N. J. Law, 666; *Reid Bros. & Co. v. Norfolk City R. Co.* 94 Va. 117; *Briggs v. Lewiston & A. H. R. Co.* 79 Me. 363; *Newell v. M., L. & M. R. Co.* 35 Minn. 112; *Nichols v. Ann Arbor & Y. St. R. Co.* 87 Mich. 361; *Detroit City R. Co. v. Mills*, 85 Mich. 634; Booth, St. Ry. Law, § 80; Joyce, Electric Law, §§ 344, 345.

The subject last referred to has been considered by the courts of most of the states of the Union, and many of the federal courts, with the uniform result indicated. A brief reference to particular decisions will give point to what has been said.

In *People v. Kerr*, 27 N. Y. 188, Mr. Justice EMOTT, speaking for the court, said: "I do not attach any importance to the motive power. I have no doubt that steam will ultimately be applied to carriages upon common roads, and I suppose it might be used upon these iron ways without affecting the present question,"— the rights of abutting property owners.

In *Newell v. M., L. & M. R. Co.* 35 Minn. 112, the right to use steam as a motive power to operate street cars was sustained, the evidence showing that the motor was so designed as not, in the operation of hauling street cars, to be materially different from horse or electric power as regards interference with ordinary public travel, or with private rights. The court said that the test to be applied, in determining whether a railway constructed on a street and operated by the use of a steam motor is an additional burden upon the fee, is whether it is in fact a street railroad as the term is commonly understood,— a railroad

constructed and operated in aid of passenger travel on the street over which it runs, by taking on and discharging passengers at street crossings,— and whether it is constructed on the street grade and operated so as not to materially interfere with the ordinary common use of the street or with the access to abutting property. *Moses v. P., Ft. W. & C. R. Co.* 21 Ill. 516, is to the same effect.

In *Detroit City R. Co. v. Mills*, 85 Mich. 634, the court considered all the elements that can be suggested why the use of electricity as a motive power should render a street railroad operated by such power different from a street railroad operated by horse power, as regards being an additional servitude upon the fee of the street owned by the abutters, and it was decided against the contentions of the abutter on all points. The decision was subsequently referred to in a case involving the same subject, and affirmed, the court remarking that there is almost a consensus of judicial opinion in that direction.

So it follows that, in determining whether a street railroad is an additional burden upon the land already set aside for the public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric, or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road be so constructed and operated, as to have the opposite effect. Electric railroads constructed in the usual way and operated by the use of the overhead trolley wire supported by cross wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street, belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question.

If the crucial test, to be applied in determining whether a street railway company is entitled to a free right of way along a public street as against abutting property owners, were whether a different motive power is used than was contemplated when the street right of the public was acquired, all new discoveries of improved modes of travel would require, as has often been remarked, dealing with the owners of the fee of the land on which the streets are located before the public could have the benefit thereof. When a new mode of using the public streets and highways is adopted, the question arises of whether it violates the rights of the owners of the fee to the streets and is inconsistent with the original design in setting the land aside for a public thoroughfare, keeping in view the fact that such design is presumed to have contemplated the adoption from time to time of improvements in mechanical appliances and their use in aid of travel upon the street,— the keeping abreast with the march of civilization, with the growth of population and consequent increase of travel, so as to adequately satisfy public needs and conveniences. Lands are set aside for public streets and highways, not for the present, with its necessities and modes of use, but for all time, with all the added demands that may be made upon the public ways within the scope of their original design, in the course of natural development that is constantly going on. Subject to that test the traction engine, automobile, and street railways, regardless of the motive power used, are entitled to the use of the street, subject to the necessity for consent by public authority in proper cases, and reasonable police regulations.

Here, as we have seen, appellant's railroad is not outside of the *Hobart Case*, 27 Wis. 194, because of the motive power used. It is within the rule in that it is for the carriage of passengers and is strictly a street railway. The complaint shows that the railway was constructed by legislative authority in all respects according to the ordinance

of the city of La Crosse granting to appellant its franchises; that the poles, including the particular pole in question, were placed at the curb lines of the streets under the supervision and direction of the proper city official; and that the mode of construction adopted generally is the usual mode where electric power is used and communicated to the car motor by means of an overhead trolley wire supported by cross wires attached to poles set at or near the curb lines of the streets. No complaint is made against the use of the streets contemplated by appellant's franchise, unless the manner in which the road is constructed on respondent's property, or the manner in which it is operated, violates private rights.

The complaint was condemned by the trial court merely because a permanent occupancy of the street, to some extent, was shown; but that is not, of itself, material in cases of street railways. As has been shown, the reasoning which the learned judge supposed he was bound by does not apply, because, unlike a telephone line, the purpose of a street railroad is within the scope of the original design of the street. Any other view would condemn *Hobart v. Milwaukee City R. Co.* and the decisions of all the courts that have sustained the rule that the use of a street for street railway purposes does not of itself impose an additional burden upon the fee. It is useless at this late day to urge that the distinction so made is unreasonable. It has had the sanction of this and other courts for upwards of a quarter of a century and is not now open to question.

On the question of whether the manner in which the road, with its appurtenances, was constructed, affects the right of the defendant to recover for an additional burden upon the fee of the street, we must come down to the simple question of whether the pole, set at the outer edge of the sidewalk on defendant's premises, interferes with access to or egress from his property. We understand from the complaint that

the pole was not located so as to interfere with any driveway or other avenue used for passage to or from the street to defendant's property outside of the street line. It merely prevented a person from stepping on or off the sidewalk at the precise point where the pole was located. That is not such an unreasonable interference with private property as to violate the rule that a street railway cannot be so constructed as to interfere with access to abutting property, without the consent of the owner thereof. As well might it be said that the mere fact, that because of the location of the rails in the street one traveling with a vehicle must approach to or go from property abutting thereon at a different angle than he otherwise would, or the fact that he cannot as conveniently use the street in front of such property for ordinary temporary purposes incident to the occupancy thereof, is a violation of private rights. Interference with access to property, within the meaning of the street railway cases, means some substantial interference. *Detroit City R. Co. v. Mills*, 85 Mich. 634; Joyce, Electric Law, § 380. A street railway pole, properly placed at the curb line of a street, no more interferes with access to or egress from property outside of the street line than a lamp post or hitching post or shade tree, and no more interferes with the ordinary use of the street for public travel.

We are aware that there is at least one case, decided in a court of last resort, where a different conclusion was reached. We refer to *Jaynes v. Omaha St. R. Co.* 53 Neb. 631. The opinion there shows that the subject treated did not receive careful study. The conclusion reached is contrary to all the authorities cited by the court. A very few cases were cited,— but a small fraction of those where courts have considered the subject under discussion,— yet those referred to were all the Nebraska court could find, so said in the opinion. The decision was based on the theory that any exclusive occupancy of any part of a street by a street railway,

is a new burden on the fee title thereof. An effort was made to harmonize the contrary holdings in the few cases cited, with the opinion, which seems to have been successful in the judgment of the writer of the opinion, yet success was reached by the exercise of judicial ingenuity that has few parallels.

A single instance will give point to what is said in regard to the manner in which decided cases were brought into harmony with the decision of the Nebraska court. *Taggart v. Newport St. R. Co.* 16 R. I. 668, one of the leading cases on the subject, which has in a measure guided many courts, was referred to. There the plaintiff, who was the owner of property abutting on the street on which a horse railway was located, which it was proposed to change to an electric street railway operated by the overhead trolley system, desired to enjoin the railway company from erecting poles and wires in front of his property, on the ground that they would constitute an additional burden thereon. The court decided to the contrary, referring to the underlying principles of the horse railway cases to justify the conclusion reached, and saying that, "It does not appear that it [the street railway operated by electricity] occupies the streets or highways any more exclusively than if it were operated by horse power." That holding the Nebraska court quickly disposed of by the remark that, "There is no question but that the law of the case is correctly laid down, if the evidence, or the record on its face, sustains the finding of fact made by the court that the electric street railway no more exclusively occupies the street than an ordinary horse railway." There was no finding of fact involved in the case. What is referred to as a finding of fact is the conclusion of the appellate court as regards whether an electric railway, with its wires over the street supported by cross wires attached to poles set in the street, "at the front margin of the sidewalks," is an exclusive occupancy of the street so as to ma-

terially interfere with its primary use or violate private rights within the principles governing horse railway cases. The decision is directly contrary to that in the *Jaynes Case.* The latter is out of harmony with all judicial and text-book authority. It was made, as it seems, by overlooking the distinction between a mere new mode of devoting a street to the use originally designed, which admits of some degree of permanent occupancy of the street without compensating the owner of the fee title, and an entirely new use of the street — a use inconsistent with its original design — which does not admit of such occupancy.

If a mere challenge can raise a question for judicial consideration, however well settled the principles involved may be, we ought to go further and inquire as regards whether the manner in which plaintiff's road is operated, as shown by the complaint, justifies the conclusion that it cannot be classed with ordinary horse-power railroads, respecting its effects upon private rights. That is a field that has been explored over and over again, as the cases heretofore cited indicate. It would be a work of supererogation to go over it again at this late day. No new light can be shed upon it. The question has been illumined by the wisdom of eminent judges of most of the courts of last resort in this country, and, with the single exception mentioned, so far as we can discover, the conclusion has been reached that a street railway, having its track laid so as to conform to the surface of the street, regardless of the motive power used or how applied, so long as neither private rights nor the common use of the street for public travel is materially affected, is governed by the law early laid down as to street railways operated by horse power; and that the ordinary electric street railway with its trolley wire supported by cross wires attached to poles set near the outer edge of the sidewalks, with due regard to the abutting property owner's convenience, satisfies the essential mentioned. Such a rail-

way is but an improved method of using the street for public travel, which was the original purpose to which it was devoted. So was the horse railroad in its day. The same principles that justify one without purchasing the right from abutting property owners, justify the other. There is no limit to the public right to use a street, and every part of it, so long as that use is in aid of public travel thereon and does not unnecessarily interfere with the common use of the way by ordinary modes of travel, and is no substantial impairment of private rights of property. An electric car, as compared with a horse car, in regard to freedom from interfering with private rights, is superior as regards relieving the street, because it moves more rapidly, is started and stopped with greater facility, and will readily move the greater number of persons the greater distance in a given time. It is superior as regards actually obstructing the street because of its more rapid motion and shorter stops. These considerations, and many others that might be mentioned, have moved courts to declare the law as here indicated. The following are a few of the multitude of cases directly on the subject: *Briggs v. Lewiston & A. H. R. Co.* 79 Me. 363; *Taggart v. Newport St. R. Co.* 16 R. I. 668; *Williams v. City E. St. R. Co.* 41 Fed. Rep. 556; *Nichols v. Ann Arbor & Y. St. R. Co.* 87 Mich. 361; *Halsey v. Rapid Transit St. R. Co.* 47 N. J. Eq. 380; *Lockhart v. Craig St. R. Co.* 139 Pa. St. 419; *Railway Co. v. Telegraph Asso.* 48 Ohio St. 390; *Louisville B. Mfg. Co. v. Central P. R. Co.* 95 Ky. 50; *Dean v. Ann Arbor St. R. Co.* 93 Mich. 330; *Ogden City R. Co. v. Ogden City*, 7 Utah, 207; *Howe v. West End St. R. Co.* 167 Mass. 46; *Birmingham T. Co. v. Birmingham R. & E. Co.* 119 Ala. 137; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.* 156 Ill. 255; *Cumberland T. & T. Co. v. United Electric R. Co.* 93 Tenn. 492; *Taylor v. P., K. & Y. St. R.* 91 Me. 193.

In Booth on Street Railway Law [§ 83], published in 1892,

after a review of all judicial authorities down to that time, the author said: "After a full consideration of the various objections raised to the use of electricity, every court of last resort to which the question has been submitted has held that the electric street railway does not constitute a new servitude, . . . does not entitle abutting owners to compensation." In Joyce on Electric Law [§§ 335–341], published in June of this year, it is said that, in every state where a street railway operated by horse power has been held not to create a new burden upon the fee title to the street, entitling the owner of such title to compensation, the holding has been the same as regards an ordinary electric street railway, except in Nebraska in *Jaynes v. Omaha St. R. Co.* 53 Neb. 631. In *Cumberland T. & T. Co. v. United E. R. Co.*, *supra*, a very well considered case decided in 1893, it is said that, "with rare unanimity the courts have concurred in holding that an electric street railway, constructed and operated upon the streets by means of an overhead trolley wire supported by poles, with permission of the public authorities, for the transportation of passengers only, and conforming its track to the surface of the ground, is not an additional servitude upon the fee within the streets, but a legitimate use of the streets within the original general purpose of their dedication."

The length to which we have gone in considering the question presented on this appeal is only justified by the fact that the precise question has not before been submitted to this court for decision, and was reserved for further consideration, in *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83, in such a way as to invite its presentation when a proper case therefor should be made up. It seems clear that in reaching a conclusion that the demurrer to the complaint was improperly sustained, the principles of *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, are followed and neither limited nor extended. It will be noted that this opinion does not lead to

the conclusion that an electric street railway pole may be placed at any point in the street near the outer edge of the sidewalk without being an added burden upon the fee title. Reasonable regard must be had, in locating such poles, for the convenience of abutting property owners in the enjoyment of their property. We gather from the complaint that the pole in this case was properly placed in respect to that rule.

By the Court.— The order appealed from is reversed, and the cause remanded for further proceedings according to law.

As to what use of a street or highway constitutes an additional burden, see note to *Western R. Co. v. Alabama G. T. R. Co.* (96 Ala. 272), in 17 L. R. A. 474.— REP.

RICHTER, County Judge, Respondent, vs. ESTATE OF LEIBY, Appellant.

107 404
111 *299

September 7—September 25, 1900.

Disqualification of county judge: "Guardian of any ward": Guardian ad litem: *Construction of statutes: Second appeal: Waiver: Embezzlement by trustee:* Devastavit: *Action on bond, when not premature: Sureties.*

1. Under sec. 2447, S. & B. Ann. Stats. (providing that when the judge of any county court shall be interested as an executor or administrator or guardian of any ward, or interested as creditor or otherwise in any question to be decided, he shall be disqualified to act in relation to that estate, etc.), the use of the words "executor or administrator" in connection with the words "guardian of any ward" indicate that the person meant is some trustee charged with the duty of caring for the property or looking after some interest pending at the time the county judge is called upon to act, and such disqualification to act continues only so long as the county judge continues to be such executor, administrator, or guardian.

2. A guardian *ad litem*, being an attorney appointed to conduct or care for a particular matter in court, and having the charge neither

of the person, nor of the property of the person, he is appointed to represent, is not a "guardian of any ward" within the meaning of said sec. 2447; and the fact that an attorney had been appointed guardian *ad litem* in an estate, his appointment being expressly limited to the particular proceeding then pending, does not disqualify him from acting in the same estate, when he became county judge three years thereafter.

3. Said sec. 2447 (fixing the limitations of the authority of the county judge while acting as a judge of probate), being legislation upon a particular subject, must be presumed to have covered all the limitations considered necessary upon that subject, and therefore a proper construction of sec. 2579 (providing that in case any judge of a county court having civil jurisdiction shall be interested in any proceeding in such court, or shall have acted as attorney or counsel for either of the parties thereto, he shall not have power to hear or determine such proceeding, or make any orders therein, except with consent of the parties thereto), confines the limitation therein prescribed to the county judge while acting in matters over which he has civil jurisdiction.

4. Where on a second appeal the record shows that the evidence on a given point is precisely the same as on the first trial, failure on the first appeal to rely upon error in respect thereto is a waiver of the right to do so on the subsequent appeal.

5. In an action against the surety on the bond of a defaulting trustee, it appeared that the trustee was properly cited to account; that he filed an account showing under oath that he had embezzled the entire estate; that the amount he should pay over had been determined; that an order entered for the payment of such amount had been duly served on him; and that he had neglected to comply therewith. *Held*, sufficient to establish a *devastavit* and demand and refusal to pay, conclusive upon the sureties on his bond, and sufficient to authorize suit thereon.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This case was before this court at the August term, 1898, and may be found in 101 Wis. 434. The facts are in no way different than therein stated, except in the following particulars: After the case had been remitted to the lower court, the defendant obtained leave to file an amended answer, in which she set up that there was no such record in the

county court of Fond du Lac county relating to the estate of John S. Emerson, deceased, as warranted the proceedings upon which plaintiff's claim was based. Upon the trial the entire record of the county court in that matter was introduced. From this record it appears that in May, 1887, a petition was presented showing that the testamentary trustee was dead; that there were funds in his hands; that the widow and minor son were the only persons interested; and asking that a new trustee be appointed. On May 13th the county court entered an order appointing the plaintiff guardian *ad litem* of the minor, and he filed his written consent so to act. A new trustee was accordingly appointed. In January, 1890, the plaintiff became county judge, and all orders in the Emerson matter after that date were made by him. The defendant objected to the introduction in evidence of all orders signed by *Judge Richter*, on the ground that they were void, he having been an interested party, and disqualified to make the same. At the close of the testimony both parties moved for a direction of a verdict. Plaintiff's motion was granted, and a verdict in his favor for $10,689.79 was entered. A motion for a new trial was denied, and judgment for plaintiff duly entered, from which this appeal has been taken.

Lyman E. Barnes, for the appellant.

D. D. Sutherland, for the respondent.

BARDEEN, J. 1. The defendant strenuously attacks the judgment herein on the ground that all the orders and judgments entered in the Emerson estate matter by *Judge Richter* are nullities, and were made and entered at a time when he was disqualified from acting. His supposed disqualification is based upon the fact that in 1887, some three years before he became county judge, he was appointed guardian *ad litem* for an infant in the proceeding which culminated in the appointment of a trustee for the Emerson

estate in place of one deceased. The defendant appeals to two statutes as establishing such disqualification. The first is sec. 2447, S. & B. Ann. Stats., which provides that "When the judge of any county court . . . shall be an executor or administrator or guardian of any ward or interested as creditor or otherwise in any question to be decided, he shall be disqualified to act in relation to that estate, or the decision of such question," etc. We are clearly of the opinion that this section was not intended to cover, and ought not to be construed to cover, a case like this. The use of the words "executor or administrator" in connection with the words "guardian of any ward" indicate that the person meant was some trustee charged with the duty of caring for property or looking after some interest then pending, for which he must account to the court, and concerning which the court must make some decision. A guardian *ad litem* is not such person. He is an attorney appointed to conduct or care for a particular matter in court. He neither has charge of the person nor of the property of the infant, and is accountable to the court only as an attorney is always accountable for the faithful discharge of his duties. Moreover, a reading of the whole section shows that it was not the legislative intention that such disqualification should be perpetual. The last clause provides that, when the disability no longer exists, the circuit judge who has been called upon to act shall transmit the papers to the county court, "and such county court shall thereafter perform all the remaining duties relative thereto." This shows a plain legislative intent to extend the disqualification to act only so long as the judge continues to be executor, administrator, or guardian. *Judge Richter's* duties as guardian *ad litem* ended as soon as the appointment of a trustee was made, if satisfactory to the interests he represented. The order of appointment expressly limited his appointment to that particular proceeding. The matter is made more significant by the fact that

in another proceeding in the same matter the following month a new guardian *ad litem* was appointed therein. In *Morgan v. Hammett*, 23 Wis. 30, and again in *Appeal of Schæffner*, 41 Wis. 260, this court held that a county judge was not disqualified from acting merely because he had been counsel for one of the parties interested in the estate.

The other statute relied on is sec. 2579, which is as follows: "In case any judge of the circuit court, or of a county court having civil jurisdiction, shall be interested in any action or proceeding in such court, or shall have acted as attorney or counsel for either of the parties thereto, such judge shall not have power to hear and determine such action or proceeding, or make any orders therein, except with the consent of the parties thereto." The county court of Fond du Lac county has civil jurisdiction, and hence it is argued that *Judge Richter* had no authority to make any order in the Emerson matter because he had been interested therein. This argument has no weight when we come to consider the exact situation. By sec. 2447, the legislature fixed the limitations of the authority of the county judge while acting as a judge of probate. Being legislation upon a definite subject, it must be presumed to have covered all the limitations considered necessary on that subject. A proper construction of sec. 2579 confines the limitations therein prescribed to the county judge while acting in matters over which he has been given civil jurisdiction. It certainly could not have been the legislative intent to prescribe one standard for a county judge who had no civil jurisdiction, and another for a judge who had that power, while exercising the same jurisdiction.

2. A further argument is made that no *devastavit* was established, and no demand and refusal to pay was shown. The evidence on this point is precisely the same as on the former trial. Every argument made here could have been made on the former hearing, and, if well founded, would

have resulted in the affirmance of the former judgment. The defendants had full opportunity to urge these objections on the former appeal. Having failed to rely upon the error, if error it is, they must be regarded as having waived their right to do so on a subsequent appeal. *Dilworth v. Curts*, 139 Ill. 508–517.

Independent of these considerations, however, we do not think the objection urged is well taken. The evidence shows that the defaulting trustee was properly cited to account; that he filed an account showing, under oath, that he had embezzled the entire estate, and that he was indebted to the estate in a large amount; that the amount he should pay over had been determined, and an order for its payment entered; that such order had been duly served on him, and that he had neglected to comply therewith. This was conclusive upon the sureties, and was sufficient to authorize suit upon the bond. *Holden v. Curry*, 85 Wis. 512; *Schoenleber v. Burkhardt*, 94 Wis. 575.

We have carefully considered the other objections raised, and are convinced that they are not of sufficient importance to require extended consideration. Certainly, none of them is grave enough to warrant a reversal of the judgment.

By the Court.—The judgment of the circuit court is affirmed.

KOHL, Respondent, vs. BEACH, Trustee, Appellant. 107 409 | 107 456

September 7—September 25, 1900.

Principal and agent: Delegation of agent's authority: Subagents: Collections: Implied authority: Mortgages.

In an action by the grantee of a mortgagor to compel satisfaction of a mortgage, it appeared, among other things, that defendant, a resident of New York, employed S. as agent to loan money under an

agreement that S. should repay all sums advanced, together with six per cent. interest. S. was authorized to handle the loaning business as if it were his own, defendant knowing that S. must necessarily employ others to assist him. S. employed P. as a subagent under an agreement in regard to loaning defendant's money, that both should receive a percentage therefrom, that P. should make collection and remit to S., and that if collection of interest at maturity could not be made, P. should advance the same to S., in order that he in turn might advance it to defendant. Defendant made a loan to plaintiff's grantor, secured by the mortgage in question, the money being paid over by P., who received the note and mortgage and transmitted them to S., who in turn transmitted them to defendant. Default having been made in an instalment of interest, P. commenced foreclosure proceedings, defendant being named as plaintiff, pending which plaintiff bought the mortgaged premises. At this time the mortgage debt was paid in full to P., who, though he did not have the note in his possession, gave an individual receipt therefor, which was accepted under the belief that he was authorized by the owner of the note and mortgage to receive payment thereof. P. also agreed to procure the note and mortgage, with a satisfaction thereof, and deliver them, which was never done, and P. never remitted the money. *Held* that, in the absence of any facts constituting an estoppel, S. had no authority from defendant to delegate to P. the essentials of his agency involving skill, intelligence, responsibility, and judgment; that P. was not the agent of, nor were his acts those of, defendant; and that the facts did not warrant the inference that P. was authorized by S. to collect the money.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action to require the defendant to satisfy a mortgage. The issues raised by the pleadings were decided by the trial court substantially as follows:

On January 4, 1893, Casper Schafer and wife borrowed of defendant $550, agreeing to repay the same in five years, and to pay interest annually at the rate of seven per cent. per annum, and to secure such payment the debtors gave defendant their negotiable promissory note and a real-estate mortgage, which was duly recorded and is set forth in the complaint.

It was provided in the mortgage that in case of the non-payment of any sum of money when due, either principal, interest, or taxes, the entire debt should, at the option of the mortgagee, his representatives or assigns, be deemed to have become due and immediatedly collectible in a suit at law or by foreclosure of the mortgage.

When the mortgage was executed defendant resided, and has ever since resided, in the state of New York. During a period commencing prior to 1892 and extending to 1896, defendant furnished to one A. L. Smith, who resided in Appleton, Wisconsin, various sums of money to be loaned by the latter in his discretion, said money being the property of an estate of which defendant was trustee. It was agreed between defendant and Smith that the latter should repay to defendant all sums advanced to him to be loaned, with interest thereon at the rate of six per cent. per annum. Smith was authorized to handle the loaning business as if it were his own, defendant knowing that his agent must necessarily employ others to assist him.

Smith's residence and place of business was at Appleton, Wisconsin, about 100 miles from the property covered by the mortgage mentioned in the complaint and from the residence of the mortgagors.

In 1892 the Marshfield Land Company, with B. W. Pulling as manager, was engaged in loaning money and obtaining loans for other persons, with its place of business at Marshfield, Wood county, Wisconsin. Subsequent to 1892 Pulling succeeded to such business, and thereafter all loaning business done by defendant, and by Smith for him, in the counties tributary, in a business sense, to Marshfield, was carried on through Pulling.

Smith and Pulling made a joint agreement in regard to loaning defendant's money, to the effect that both should receive a percentage therefrom, and that Pulling should make collection and remit to Smith; and if collection of

interest at maturity could not be made in any case, Pulling should advance the same to Smith in order that he might advance the same to defendant.

The money received by Schafer and wife was paid them by Pulling, the note and mortgage was received by Pulling, the mortgage was recorded by him, and all the papers relating to the loan were then by him transmitted to Smith at Appleton, and by Smith were transmitted to defendant.

Prior to 1896, under the arrangements mentioned, money controlled by defendant was loaned to the amount of some $60,000, the loans being several hundred in number. Payments of interest and principal upon loans were made to Pulling from time to time, such payments being generally duly remitted to Smith. Schafer at no time received any notice that Pulling was not authorized to receive payments of interest or principal on the money borrowed by him. On the contrary, Pulling was by letter directed by Smith, in January, 1894, to collect overdue interest of Schafer. Eight dollars and fifty cents of the first instalment of interest due on the Schafer loan was in fact paid to Pulling.

In April, 1894, Pulling caused foreclosure proceedings to be commenced on the Schafer mortgage for nonpayment of the first instalment of interest on the mortgage debt, the defendant being named as plaintiff in the action, and thereafter, on May 17, 1894, Schafer sold the mortgaged premises to plaintiff, at which time the full amount of the mortgage debt, to wit, $595.35, was paid to Pulling. When such payment was made Pulling did not have in his possession the note and mortgage, but agreed to procure the same, with a satisfaction of the mortgage, and make delivery thereof to Schafer; but such promise was not kept. Pulling gave to Schafer the receipt of his land company for the money received as aforesaid, which receipt was accepted by Schafer in the belief that Pulling was authorized by the owner of the note and mortgage to receive payment thereof.

About the time the foreclosure proceedings aforesaid were commenced, Pulling caused other foreclosure proceedings to be instituted in the name of defendant to enforce mortgages owned by him, and subsequent thereto continued to conduct business in that way, some of which foreclosure proceedings were settled, and some prosecuted to judgment and sale, the lands being bid in in the name of *Daniel Beach*, trustee. In all of the foreclosure proceedings aforesaid the complaints were verified by Pulling as agent for the defendant. Smith had knowledge of the business transactions of Pulling in relation to the foreclosure of mortgages, and authorized the same.

Upon such facts the court concluded as matter of law that Smith had authority to employ Pulling and the Marshfield Land Company to assist him in making loans; that he exercised such authority; that Pulling was, at the time he received the money from Schafer, the agent of defendant by the authority of Smith, and that such payment was in effect payment to defendant and extinguished the mortgage in question, and that plaintiff was entitled to judgment accordingly. Judgment was duly entered in accordance with such conclusions, from which defendant appealed.

Lyman E. Barnes, for the appellant.

George L. Williams, for the respondent.

MARSHALL, J. The decision in this case is not grounded on any estoppel of defendant by his conduct, and the conduct of others for which he was responsible, to deny the authority of Pulling to receive payment of the mortgage debt; and there is no evidence in the record to sustain any such theory. Whatever was the customary way of conducting the business prior to the making of the loan to Schafer, between defendant and Smith and between Smith and Pulling or the Marshfield Land Company, or the way in which business was conducted between the parties thereafter, it is not

claimed, and there is not a word of evidence tending definitely to show, that Schafer knew anything about it or that he was influenced by any appearance of authority on the part of Pulling, other than the circumstance that he borrowed the money through Pulling and the latter had assumed the right to collect interest and to cause an action of foreclosure to be commenced for nonpayment thereof.

The customary and indispensable evidence of apparent authority, as was held in *Bartel v. Brown*, 104 Wis. 493,—possession of the note,—Pulling did not have, as Schafer well knew when he parted with the money. The note and mortgage, and all the papers relating thereto, were in the possession of appellant at New York. Schafer parted with his money upon the mere receipt of Pulling, executed in the name of his land company. The receipt does not purport to be given for appellant, and there was no pretense by Pulling that he was acting by authority, except what was inferable from the fact that he assumed to act in the matter. As was well said in *Joy v. Vance*, 104 Mich. 97, if Schafer had been as careful to ascertain the authority of Pulling as appellant was to guard his interest by keeping possession of the papers relating to the loan, no one would have suffered by Pulling's dishonesty.

Bartel v. Brown rules this case in this respect: The note not being in Pulling's possession when he received the money, such receipt was not in fact a payment to appellant unless Pulling had actual authority to represent the appellant in the transaction. The question of what is requisite to apparent authority in such cases received careful consideration in the *Bartel Case*, and the decision is in line with the great weight of judicial and text-book authority. The principle there declared must be considered as too firmly established to be open to reconsideration. In addition to the authorities cited in the *Bartel Case*, the following are directly in point: *Ilgenfritz v. Mutual B. L. Ins. Co.* 81 Fed. Rep. 27; *Mutual*

B. L. Ins. Co. v. Miles, 81 Fed. Rep. 32; *Cummings v. Hurd*, 49 Mo. App. 139; *Murphy v. Barnard*, 162 Mass. 72; *Johnston v. Milwaukee & W. I. Co.* 46 Neb. 480; *Joy v. Vance, supra; Trowbridge v. Ross*, 105 Mich. 598; *Wilson v. Campbell*, 110 Mich. 580; *Church Asso. v. Walton*, 114 Mich. 677; *Bacon v. Pomeroy*, 118 Mich. 145; *Dexter v. Morrow*, 76 Minn. 413; *Hollinshead v. John Stuart & Co.* (N. Dak.), 77 N. W. Rep. 89; Randolph, Comm. Paper, § 1450, and cases cited.

There is very little conflict in the evidence, and it is not contended, as we understand it, but that the facts were correctly found by the trial court so far as the findings are confined to what was said and done by the parties. From such occurrences and the nature of the business Smith was employed to transact for defendant, the trial court found by inference, as a fact, that Smith was given authority by appellant to employ Pulling to transact the business done by him, including that with Schafer; and further concluded from the facts as a matter of law, that Pulling was the appellant's agent and that his acts were the acts of appellant. That, as we understand the trial court, is on the theory that the facts found indicate that Pulling was a general agent of defendant and as such was authorized to receive payment from Schafer, such act being within the scope of the general employment. The contest on this appeal is on the points indicated.

We are unable to agree with the trial court's conclusion that the nature of appellant's relations with Smith required the latter to employ assistants and delegate to them authority to perform the important branch of the business of the agency of collecting and remitting money. True, an agent may employ others to assist him in the purely ministerial and unimportant details of his employment, but not to do the essentials of the agency, involving the skill, intelligence, responsibility, and judgment that is at the very bottom

of the employment. The special confidence reposed in the agent as to such matters precludes him from delegating his trust to others, except upon some express understanding with his principal. Mechem, Agency, sec. 185, and cases cited.

The doctrine is familiar that if a person be intrusted with a note for collection, and the debtor resides so far from the place of business of such person that he cannot conveniently reach such debtor so as to properly and promptly perform the service, authority will be implied that such person may forward the note to a collector within convenient reach of the debtor and perform the service through such collector. That is within the general rule that authority to an agent to do an act includes authority to use the usual and necessary means to effect the purposes of the agency.

If Smith had authority in this case to collect the note from Schafer, the fact that he did not have possession of the security effectually, *prima facie*, rebuts the theory that he had authority to transfer his trust to Pulling, because such possession and ability to transfer it to Pulling was indispensable to enable Smith to clothe Pulling with apparent authority to act in the matter and to enforce collection of the debt, if Schafer were to stand upon his rights or even act as a reasonably careful person should.

Having come to the conclusion that the facts found, from which the trial court inferred authority in Smith to employ Pulling, do not lead to such inference, consistent with legal principles, we might decline to go further. However, we have carefully considered the circumstances found by the court, and come to the conclusion, in the light of the law applicable thereto, that they do not warrant the inference that Pulling was authorized by Smith to collect the money from Schafer. We cannot say the relations between Smith and Pulling, and the manner in which they conducted business, were sufficient to prevent Smith from denying Pulling's authority under the doctrine of estoppel, because there

is no finding that Schafer knew of such relation and course of business, neither is there any evidence to that effect, as before indicated. We cannot say that Pulling had implied authority to collect the money from Schafer, because he did not have possession of the note and mortgage. We cannot say that the facts found implied express or actual authority to Pulling to collect the money from Schafer, because such a conclusion, against a person who exercises the precaution to protect himself from fraud or loss by keeping possession of his securities, in favor of another who claims to have extinguished them by payment to such person's agent, within the great weight of, if not universal, authority, requires strong and convincing evidence,— much stronger evidence than the circumstances found to exist in this case. A review of a few of the cases already cited will demonstrate the correctness of what is here said.

In *Murphy v. Barnard*, 162 Mass. 72, cited by appellant's counsel, the mortgagee, a lawyer, having assigned the note and mortgage, by consent of the assignee was allowed to retain possession thereof for the purpose of collecting the interest as it should fall due. Thereafter the mortgagor, in ignorance of the assignment, and without knowing of, hence without relying upon, the mortgagee's custody of the securities, and at a place other than the mortgagee's office where the papers were kept, made payments to the mortgagee to apply on the principal of the debt, which payments the mortgagee embezzled. It was held that, regardless of the hardship to the mortgagor, the stringent rules governing the handling of negotiable paper required the court to hold that the mortgagor, in making the payment to the mortgagee on the mere assumption that he was the owner of the note, because of want of knowledge of the assignment, did not preclude the true owner of the securities from enforcing full payment of the debt.

In *Bromley v. Lathrop*, 105 Mich. 492, the assignor of a

mortgage, who was engaged in loaning money on real estate and subsequent to the assignment associated others with him in carrying on the same business under the corporate name of the Michigan Mortgage Company, collected the semi-annual instalments of interest on the mortgage debt for about nine years, once in the meantime arranging an extension of the time of payment of the principal, and sent such collections, as made, to the assignee upon receipt of the interest coupons. The mortgagor did not know of the assignment of the mortgage, and the assignee did not know that the assignor and his successor assumed to the mortgagor to have any authority other than to receive the interest payments and to remit the same upon receipt of the coupons. At the maturity of the debt, the securities being in the hands of the assignee, the mortgage company demanded payment of the note of the debtor, whereupon he paid the same, supposing from the manner in which the business had been conducted for years that it was the true owner of the debt or had authority to collect it. The court held that there was no ground for a conclusion that the assignee of the mortgage gave to the mortgage company either general or special authority to receive the money for him.

In *Church Asso. v. Walton*, 114 Mich. 677, the Michigan Mortgage Company was again the mischief-maker. A long correspondence between one Bissell and the mortgage company was received in evidence, very much the same as in this case, showing that Bissell, as agent, made a large number of mortgage loans through the mortgage company, the business covering a considerable period of time, and that the company made all collections of interest on and principal of the loans, and remitted the same to Bissell as such interest and principal became due; that the company received express directions from Bissell, from time to time, or the papers were sent to it for delivery on payment of the money. The mortgage company collected the interest on the loan in

question as occasion required, and in the end collected the principal without any express directions to do so, assuming to have general charge of the Bissell loans, and without having possession of the note and mortgage. The mortgagor made the payment, in ignorance that the mortgage and the debt secured thereby had been assigned, supposing that the mortgage company was the owner thereof. The court held that such facts did not establish a general agency in the mortgage company to collect the principal of the Bissell loans or of the one in question.

The case before us, like those above referred to, and many more that might be cited, is one of great hardship to respondent and his vendor. If there were a way by which they could be protected, consistently with established legal principles, the court would gladly do so. It is plain that one of two parties must suffer from the dishonesty of Pulling. The court cannot determine which one must bear the burden by the standard of which can best bear the loss, but must be guided by the law governing such situations. Appellant used the precaution to keep possession of his securities, the indispensable evidence of implied authority to collect the mortgage debt. No express direction was given to Pulling, by any one, to make the collection, and he had no general authority covering the subject. There is certainly no definite evidence that he was in the habit of collecting the principal of appellant's loans without express direction to do so, or possession of the securities. He did not, by anything he said or did at the time the payment was made by Schafer, indicate to him that he was acting under the directions of appellant or Smith. He was responsible to Smith for the payment of interest on the debt, and his closing up of the transactions with Schafer, upon default being made in the first instalment of interest, without the option to declare the principal of the debt due being exercised by the owner, indicates that he was acting to save himself rather

to save Smith or appellant, or to perform an authorized service for them or either of them. His position enabled him to impose on Schafer by obtaining the latter's money without a surrender of the note and mortgage, simply because Schafer neglected to insist on such surrender before making the payment. The penalty of such negligence must rest upon the one who was at fault. The misfortune cannot be shifted to appellant, who rightfully relied on the possession of his securities for collection.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment dismissing the complaint, with costs.

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THE STATE EX REL. DAVIS & STARR LUMBER COMPANY, Appellant, vs. PORS, Clerk of City, Respondent.

September 8 — September 25, 1900.

Taxation: Assessment of property omitted from previous years: Statutes: Construction: Board of review.

1. Sec. 1059, Stats. 1898, as amended by ch. 50, Laws of 1899, provides that real or personal property omitted from assessment in any of the three next previous years by mistake or inadvertence, unless previously reassessed for the same year or years, *shall be entered once additionally* for each previous year of such omission, giving the year of omission, and affixing a just valuation to each entry for a former year as the same should then have been assessed according to the best judgment of the assessor, and taxes shall be apportioned and collected on the tax roll for such entry. The statute originally applied solely to real estate and was extended by the amendment of 1899 to include personal property. *Held*, that the legislature did not intend to limit the effect of the amendment of 1899 to such personal property as remained unchanged in ownership or location, but intended thereby to include any and all personal property which by inadvertent omission escaped assessment, and that such intention is capable of enforcement as to any omitted property which, between the time of its omission and the time of

reassessment, has passed out of existence, out of the ownership of the person assessed, or out of the assessment district.

2. The words "entered once additionally" in said sec. 1059, while used originally with reference to real estate, when applied by said amendment of 1899 to personal property, are *held* to apply to the purpose contemplated by the statute, rather than to the clerical method by which it is to be accomplished, and to be one of the steps leading to the ultimate result,— that the taxes shall be apportioned and collected on the tax roll for such entry.

3. The general provision of sec. 1055, Stats. 1898, requiring property to be assessed from actual view, does not apply to an assessment of personal property omitted from a previous assessment, under sec. 1059 as amended, since the latter section provides that assessments made thereunder shall be according to the assessor's best judgment.

4. Said sec. 1059, Stats. 1898, with its amendment including personal property, was intended to take immediate effect according to its terms, and regulated the conduct of assessors thereafter, without regard to whether the omissions to assess occurred before or after the enactment of the amendment. Being purely a remedial statute, it was within the power of the legislature to give it such effect.

5. Where in proceedings before a board of review, on objection to the assessment of plaintiff's personal property, no contention was made or evidence offered that the assessor's designation of it on the roll was not in accord with the facts, the board cannot ignore the assessor's report, and they commit no error in refraining from changing the assessment roll in that respect.

6. MARSHALL and BARDEEN, JJ., dissenting, consider that the words of sec. 1059, Stats. 1898, as amended by ch. 50, Laws of 1899, in themselves, or as applied to the subject to which they refer, are not ambiguous; that taken in their literal sense they do not admit of any other meaning than that, when property is assessed in any year, it shall also be assessed once additionally for each of the three preceding years that it was by mistake or inadvertence omitted from the assessment roll; and that the use of the word "additional" in the law is an insurmountable barrier to reaching a conclusion that it was the legislative purpose to remedy mistakes in the omission of property from the assessment roll, if discovered within three years from the commission of the mistake, regardless of a change in the ownership of the property in the meantime, or the consumption or destruction of the property itself.

APPEAL from an order of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

On November 4, 1899, a writ of *certiorari* was issued out of the circuit court to the respondent as clerk of the city of Marshfield, commanding him to send up for review the proceedings taken in reference to the assessment against the relator in 1899 of certain property omitted in 1898. From the return it appears that the relator was assessed, under the heading, "Value of Logs, Timber, Lumber, Ties, Poles, and Posts, Mfrs. Stock," $11,335, and in addition was assessed under the same heading $14,604, marked "Omitted for the Year 1898." The latter item appears from the roll to have been made up in nearly equal parts of lumber and logs. The relator appeared before the board of review by its secretary, Bert E. De Yo, and its attorney, Hon. William F. Bailey, and objected to the assessment against it for lumber and logs omitted in 1898, and accompanying such objection filed the affidavit of said De Yo, not controverting the existence on May 1, 1898, of lumber and logs to the amount specified, but asserting that no part of the logs so existing on May 1, 1898, remained uncut or unmanufactured on the 1st day of May, 1899, and that none of them were in the city of Marshfield or elsewhere at the latter date; and further alleging that no part of the lumber owned by relator on May 1, 1899, or at any time subsequent thereto, or which was then situated in said city, was owned by said corporation on May 1, 1898, and that none of the lumber which it did own on May 1, 1898, was situated in the city of Marshfield on the 1st day of May, 1899. The records of the board state that the relator objected "on the ground that the assessor and the board have not the right or power to assess the personal property which was omitted in the assessment of said year 1898." The board listened to argument, submitted the question of law to the attorney general, and finally overruled

the objection. No witnesses were sworn, and no evidence offered or taken, before the board of review, unless the affidavit of said De Yo is such.

After the filing of the return, the respondent moved the court, upon the petition, writ, return, and its exhibits, and upon certain additional affidavits, to quash the writ. Those affidavits tended to establish the existence at Marshfield, and appellant's ownership on May 1, 1898, of the lumber and logs so assessed, the inadvertent omission thereof, and that no taxes had been assessed or collected from the relator thereon for the year 1898. The court entered an order January 31, 1900, "that said writ of *certiorari* herein be, and the same hereby is, quashed and dismissed upon the merits;" from which order the relator appeals.

W. F. Bailey, for the appellant, contended, *inter alia*, that the amendment to sec. 1059, Stats. 1898 (ch. 50, Laws of 1899), could not operate retrospectively. *Seamans v. Carter*, 15 Wis. 548; *Finney v. Ackerman*, 21 Wis. 268; *Warner v. Trow*, 36 Wis. 195; *Vanderpool v. L. C. & M. R. Co.* 44 Wis. 663; *Hall v. Banks*, 79 Wis. 235; *Dean v. Charlton*, 27 Wis. 526; *Rheinstrom v. Cone*, 26 Wis. 163; *Bernier v. Becker*, 37 Ohio St. 72; *Shallow v. Salem*, 136 Mass. 136; *Kelley v. B. & M. R. Co.* 135 Mass. 448; *Hastings v. Lane*, 15 Me. 134; *Johnson v. Burrell*, 2 Hill, 238; *Sanford v. Bennett*, 24 N. Y. 23; *Palmer v. Conly*, 4 Denio, 376; *Conley v. Palmer*, 2 N. Y. 182; *Dash v. Van Kleeck*, 7 Johns. 477; *Hackley v. Sprague*, 10 Wend. 113; *Higgins v. Bear River & A. W. & M. Co.* 27 Cal. 153. The statute in question did not authorize the personal property of plaintiff, not in existence at the time the reassessment was made, to be assessed as omitted property. Stats. 1898, secs. 1033, 1040, 1044, 1055; *Hayden v. Roe*, 66 Wis. 288; *Wilcox v. Rochester*, 129 N. Y. 247; *Day v. Pelican*, 94 Wis. 503.

For the respondent there was a brief by *P. A. Williams*, attorney, and *B. R. Goggins*, of counsel, and oral argument by *Mr. Goggins*.

DODGE, J. 1. The circuit court having expressly declared that it quashed the writ of *certiorari* "on the merits," we, for the purposes of this review, shall consider its action as tantamount to a judgment of affirmance, in the light of *State ex rel. Gray v. Common Council of Oconomowoc*, 104 Wis. 622, 628, and authorities there cited. Upon such consideration two principal questions arise, and have been debated with much vigor by counsel: first, whether sec. 1059, Stats. 1898, as amended by ch. 50, Laws of 1899, authorizes reassessment upon any omitted personal property which between the time of its omission and the time of reassessment has passed out of existence, out of the ownership of the person assessed, or out of the assessment district; second, whether such act authorizes reassessment of personal property omitted prior to the amendment.

Sec. 1059, with the amendment in brackets, provides: "Real [or personal] property omitted from assessment in any of the three next previous years by mistake or inadvertence, unless previously reassessed for the same year or years, shall be entered once additionally for each previous year of such omission, designating each such additional entry as omitted for the year 18— [giving year of omission], and affixing a just valuation to each entry for a former year as the same should then have been assessed according to his best judgment, and taxes shall be apportioned and collected on the tax roll for such entry."

This section had for many years served to authorize, and with the aid of the general taxing machinery to enable, the assessment and collection of omitted taxes on real estate. The addition of personal property to the subjects affected thereby could have had no purpose save to authorize and enable in like manner, and to the same extent, the collection of personal taxes which ought in previous years to have been paid, but, by reason of like omission to assess, had not been. This legislative purpose is entirely obvious, and should be

given complete effect, unless insuperable obstacles prevent. *Harrington v. Smith*, 28 Wis. 43, 59; *Brown v. Pendergast*, 7 Allen, 427; 7 Lawson, Rights, Rem. & Pr. 5922; *State ex rel. Heiden v. Ryan*, 99 Wis. 123.

The general purpose of legislation of this class, namely, to provide means for enforcing the obligation of each individual to contribute to the expenses of government according to the taxable property owned by him, whenever he shall have escaped or evaded that obligation, has many times received the commendation of this and other courts. It is promotive of, nay essential to, the constitutional behest that taxation be uniform. *Tallman v. Janesville*, 17 Wis. 71; *Cross v. Milwaukee*, 19 Wis. 509, 516; *Wilcox v. Eagle*, 81 Mich. 271. This purpose must in large measure fail if a disposal, consumption, or removal of personal property after the time when assessment should have been made prevents its reassessment.

The principle at the foundation of these reassessment laws is that the owner of property is under obligation — some authorities say he is indebted — to the government to pay a sum proportioned to the property owned by him on May 1st of each year. *Warden v. Fond du Lac Co.* 14 Wis. 618, 620; *Peters v. Myers*, 22 Wis. 602; *Flanders v. Merrimack*, 48 Wis. 567, 572; *Sturges v. Carter*, 114 U. S. 511, 518. This obligation he owes primarily to the municipality in which certain classes of property are on that date situated, for the municipality, under our system, collects the taxes as trustee for the other branches of government, state, county, and school district.

Several obstacles are suggested by appellant to the enforcement of this statute, where the omitted property is either not owned by the same person, or is not within the same taxing district at the time of reassessment. First among these is the language of the statute requiring that it be "entered once additionally" for each of the omitted

years; the argument being that if the property cannot be entered originally against the person for assessment that year it cannot be entered "additionally" for preceding years. The language, of course, is not entirely apt as applied to the supposed situation, but it was used originally with reference to real estate, and accomplished the result of securing its reassessment for the years of omission. We have no doubt from the manner of the amendment that the legislative purpose contemplated the result rather than the clerical method by which it was accomplished. *Plum v. Fond du Lac*, 51 Wis. 393, 397. The appellant's objection is very technical and refined, hardly less so than would be the suggestion that the entry of any amount for preceding years must of necessity be "additional" to any sums otherwise assessable against the same person. The step thus criticised is but one of those leading to the ultimate result intended and commanded by the legislature, namely, that "taxes shall be apportioned and collected on the tax roll for such entry." We are satisfied that any matters of mere form in the procedure can and should be adjusted to accomplish this result.

Again, it is urged that if the property is not in existence it cannot be within the jurisdiction of the assessors. This contention loses sight of the consideration that the whole subject of taxation is within the control of the legislature, subject only to the constitutional requirement of uniformity, and that branch of the government can confer jurisdiction to apportion and collect taxes when and where it deems best. *Cross v. Milwaukee*, 19 Wis. 509; *North Carolina R. Co. v. Comm'rs of Almance*, 82 N. C. 259, 268. In the latter case the assessment rested with the township board of trustees at the time the tax should have been levied, but the function had before the time of reassessment been transferred to other officers. The latter were nevertheless held justified in taking the steps necessary for such reassessment and collection authorized by statute.

It is suggested that this construction, whereby assessors may assess property not in existence or not within their district, is inconsistent with the general policy of the statute (sec. 1055), which directs ordinary valuation for assessment of personal property to be upon actual view as far as practicable. But the section under consideration (sec. 1059) expressly excepts reassessments from that requirement by providing that they shall be "according to the assessor's best judgment." This objection was urged and refuted in *Cross v. Milwaukee*, *supra*, where the property involved had been substantially changed in value by the burning of the buildings thereon.

We reach the conclusion that the legislature did not intend to limit the effect of the amendment of 1899 to such personal property as remains unchanged in ownership and location, but to include any and all which by inadvertent omission escaped assessment, and that such intention is not incapable of enforcement under the circumstances presented in this case.

2. The second question, whether sec. 1059, as amended authorizes the reassessment of personal property omitted from assessment prior to the amendment, is one of construction merely; for the power of the legislature to so authorize and direct has long since been placed beyond discussion. *Flanders v. Merrimack*, 48 Wis. 572, and cases there cited. A general rule of construction, sometimes said to apply to all statutes, and often repeated in our own decisions, is to the effect that statutes are not to be construed as having a retrospective effect unless the intention of the legislature is clearly expressed that they shall so operate. *Seamans v. Carter*, 15 Wis. 548; *Finney v. Ackerman*, 21 Wis. 268; *Vanderpool v. L. C. & M. R. Co.* 44 Wis. 663; *Jochem v. Dutcher*, 104 Wis. 611. This rule is accompanied, however, by another equally well settled, stated by Chancellor Kent (1 Comm. 455), as follows: "This doctrine [prospective construction of stat-

utes only] is not understood to apply to remedial statutes, which may be of a retrospective nature, provided that they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations." And by Cooley (Taxation [2d ed.], 293): "A remedial provision may well be presumed to have been intended to reach back for the purposes of justice. And in cases where a tax is levied to meet expenses previously incurred, or to pay the cost of something of which the persons to be taxed have already had the benefit, any presumption against an intent to give the law retroactive operation may be overcome by the apparent justice of such a construction." In *Klaus v. Green Bay*, 34 Wis. 628, 636, this distinction was recognized and applied to an act providing that subcontractors for state, county, town, city, or village might maintain an action to compel the payment to them of the amount due the principal contractor, and the act was held to confer the right of action, although the indebtedness had been incurred before its passage.

We think it clear that the act here in question falls within the classification covered by the latter rule. It creates no new obligation, but is purely remedial. As we have already said, it is predicated upon the obligation of every individual to pay that proportion of the taxes warranted by his property existing at the time when assessment was omitted, and provides further remedial steps for the enforcement of such obligation and collection of the tax when it has failed of payment through some irregularity or omission in the steps otherwise prescribed. Considering, then, the construction of sec. 1059, it should be observed that both the form and purpose of the statute are addressed to regulating and directing the conduct of assessors, not to declaring rights or obligations or commanding conduct of those who omit to pay their taxes. The reference to omitted assessments is

merely by way of description of a situation in which the assessor is commanded to act. Thus viewed, the statute is clearly prospective. It seeks not to regulate or modify the effect of any acts already done, but to direct the doing of acts in the future, and, as to such acts, to "take effect and be in force from and after its passage and publication." The letter of the statute would have been disobeyed had an assessor in May, 1899, failed to enter upon his assessment roll any real or personal property omitted from assessment in any of the three next preceding years. Construing a very similar statute of Ohio, the supreme court of the United States said: "As this act took effect upon its passage, it authorized the auditor, in any future corrections and adjustment of taxes, to extend his inquiries back for a period of four years. It did not require him to wait four years after its passage before he could give it full effect." *Sturges v. Carter*, 114 U. S. 513, 517.

This court, construing ch. 222, Laws of 1885, providing that when public lands once withdrawn from sale are reoffered they shall first be offered at public sale, held the act to apply to lands withdrawn before its passage. It was said, NEWMAN, J.: "This construction does not, as counsel urges, give the statute a retroactive operation. . . . It operates only on a condition existing at the time of its passage or arising afterwards." *State ex rel. Sweet v. Cunningham*, 88 Wis. 81, 87. The original of sec. 1210*b*, authorizing reassessment in suits, was unhesitatingly applied in the case of taxes unlawfully assessed before the act, in *Plumer v. Marathon Co.* 46 Wis. 171, and *Flanders v. Merrimack*, 48 Wis. 567. Other statutes affecting remedies have been held to apply immediately to the step directed, although the conditions upon which the law acted grew out of events or acts precedent to the legislation, where the language used was no clearer than that now under consideration. *Parker v.*

Kane, 4 Wis. 1; *Klaus v. Green Bay*, 34 Wis. 628; *Plum v. Fond du Lac*, 51 Wis. 393; *Reed v. Madison*, 83 Wis. 171, 178; *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 306.

It is true there are cases, some of them cited above, which ignore the consideration that the legislation acts directly only on future acts, and deny to it even indirect retrospective effect upon precedent rights or conduct. We do not impugn the correctness of those decisions, applied as they were to legislation of a different class, not addressed merely to regulating or perfecting remedies for the enforcement of existing obligations. They do not conflict with the rule of such cases as those last cited, which fully justify the conclusion that sec. 1059, with its amendment including personal property, was intended to take immediate effect according to its terms, and to regulate the conduct of assessors thereafter, without regard to whether the omissions to assess occurred before or after 1899; from which conclusion it results that the action of the assessor attacked by appellant was lawful and proper, and that no error was committed by the board of review in refusing to set it aside.

3. One other contention on part of appellant demands brief consideration. He insists now, on authority of *Mitchell v. Plover*, 53 Wis. 548, that the lumber belonging to plaintiff was not manufacturers' stock, but merchants' goods. He made no contention and offered no evidence before the board of review that the assessor's designation of it on the roll as manufacturers' stock was not in accord with the fact. Obviously, lumber may be merchandise when kept for sale, or may be manufacturers' stock if held for the purpose of being manufactured into furniture, vehicles, or doors. In the absence of any evidence to the contrary, the board of review could not ignore the assessor's report that it was the latter, and committed no error in refraining from changing the assessment roll in that respect.

The board of review does not appear to have acted either beyond its jurisdiction or contrary to law, and the circuit court properly quashed the writ of *certiorari* on the merits.

By the Court.—The order appealed from is affirmed.

MARSHALL, J. There is a trite expression in judicial literature which embodies the idea that compels me to dissent from the decision in this case, namely, It is not the province of the court to make the law but to expound and apply it. The judicial function and that of the lawmaking power are each independent of the other. Those whose duty it is to exercise the one cannot properly cross the boundary line that separates it from the other; though it is true that such line is sometimes so indistinct that judges, deeply imbued with the idea of what was the legislative purpose in making a law, especially if that purpose be strongly promotive of public interests and good citizenship, will sometimes cross it to accomplish such purposes, apparently overlooking those safeguards to judicial footsteps that have been located along the judicial pathway by the accumulated wisdom of ages. It seems to the writer that those guides were not strictly observed in reaching the conclusion of the court in this case, else a contrary decision would have been the result.

A brief reference to well-recognized rules for judicial construction, which form some of the guides above referred to, and their application to the statute upon which this case turns, will sufficiently show the reasons why I cannot agree with the decision of the court.

We have first the rule, that words which are plain, and in their literal sense lead to no inconsistent or absurd consequence, must be presumed to have been used with their common and ordinary meaning; and that such presumption must absolutely prevail. "*Absoluta sententia expositore non eget.*" That rule has been a guide for the courts of this country and England through a period covered by the great

body of our judicial records, and is often found stated in the language of Vattel (Law of Nations, bk. 2, § 263) thus: 'It is not allowable to interpret what has no need of interpretation. . . . When the meaning is evident, and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which the words naturally present. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it. Such a method, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not, by interpretation, be rendered useless.' That recognizes that the consequence of adhering to a literal reading of words used in a legislative enactment may of itself call for judicial construction of the act, and justify in some cases a violation of the letter of the law in order to reach the real spirit of it and give effect to the legislative will. But that is limited by the principle that neither rules of law nor of language can properly be violated to carry out a legislative idea, however clear it may be that the law was intended to convey such idea. That is to say, when interpretation of the words or construction of the language of an act is proper, a meaning cannot be properly ascribed thereto that is not within the reasonable meaning thereof; for while by judicial construction we may get the right meaning out of words, it is not within the legitimate sphere of judicial construction to put meaning into them. *State ex rel. Heiden v. Ryan*, 99 Wis. 123. As is often said: "Courts cannot go, by construction, beyond the reasonable meaning of language, whatever may be the consequences." Lord TENTERDEN, in *Rex v. Barham*, 8 Barn. & C. 99, treating of the same subject, said: "It is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature." Lord CAMPBELL, recognizing the same limitation

upon judicial construction, in *Coe v. Lawrence*, 1 El. & Bl. 516, used the following language: "I cannot doubt what the legislature intended to do; but they have not carried it into effect. . . . It is better that we should adhere to the words they have used, than that we should strive to amend it."

It follows that if the words of an act reasonably admit of but one meaning, that meaning must be adopted regardless of the wisdom of the act or whether it will effect the legislative purpose; and that the power to go beyond the ordinary meaning of words is limited by the rule, that if the language of an act be open to judicial construction, a meaning cannot properly be ascribed to it that is not within the reasonable scope of such language, whatever may be the consequences of adhering to that limitation. To go beyond that is to alter the law and do what the legislature may have intended but failed to do. The ultimate end of judicial construction is not to determine what the legislature meant, but what the language used by the legislature means.

In view of what has been said and the fact that my brethren obviously consider the statute (sec. 1059, Stats. 1898) open to judicial construction, we would expect to find that established legal principles were applied to it in order to determine what the language used therein means. But if such application were made, we are unable to discover that it proceeded further than to determine that the legislature evidently intended to provide that personal property, omitted from the tax roll one year, shall be assessed for such year thereafter if the omission be discovered within three years, regardless of any change in the title in the meantime or even of the existence of the property at the time of remedying the omission. It is assumed, as we take it, that such situation justifies a construction that will effect the legislative idea, whether the meaning attached to the language under consideration is reasonably within its scope

or not. No claim is made that the words, "shall be entered once additionally for each previous year of such omission," include within their reasonable meaning an entry not additional to an entry for the current year. But it is said we must hold that the legislature did not intend to limit the remedy for mistakes of assessors in omitting property from the assessment, to property still liable to assessment to the same person as at the time it was omitted, else the legislative purpose "in large measure must fail." That is, as we take it, the point under consideration is made to turn on a rule of construction which of itself does not justify attributing to words a meaning contrary to their literal sense,—a rule which, if followed regardless of its limitations, will often lead to an apparent failure to observe that the judicial office is "*jus dicere*," not "*jus dare*." Lord WESTBURY, in *Ex parte Vicar, etc. of St. Sepulchre's*, 33 Law J. Ch. 372, stating the construction of a law to effect abstract justice, and a presumed legislative purpose, disregarding the limitations to which we have referred, said: "The vice chancellor is of opinion that what he denominates the abstract justice of the case requires this interpretation. . . . I cannot admit the principle, that in a matter of positive law, abstract justice requires or justifies any departure from established rules of interpretation. Those established rules no doubt admit of putting a secondary meaning upon words where the ordinary and primary signification would lead to some absurdity or impossibility. But where the conclusion is merely that there is a *casus omissus*, for which the legislature has not provided, to alter the ordinary rules of interpretation upon the principle of a duty due to abstract justice, is simply to legislate and not to interpret."

The force of the foregoing will appear by a careful study of the words of the statute under consideration: "Personal property omitted from assessment in any of the three next previous years by mistake or inadvertence, . . . shall

be entered once additionally for each previous year of such omission." As we look at those words, the first question that the judicial interpreter should solve is, Are they in themselves, or when applied to the subject to which they refer, ambiguous? If not, as we have seen, they must be taken in their literal sense. It would seem that the words are plain and do not admit of any other meaning than that, when property is assessed for any year, it shall also be assessed once additionally for each of the three preceding years that it was by mistake or inadvertence omitted from the assessment roll. I do not understand that the contrary is held by my brethren, except for some judicial power of the court to give to words a meaning which will effect a plain legislative purpose rather than that the purpose shall fail. But the court has no such legitimate power, as we have seen. All must admit that it is impossible to do a thing "once additionally" till the thing has been originally done. That is too clear for serious discussion.

If we are right in the foregoing, then the law under consideration cannot be construed as the court has construed it, except by rejecting entirely the significant word "additionally." That is what has in fact been done. If there is any rule of construction that will justify such a course, the writer is not aware of it. Words obviously omitted by mistake, which prevent an act having a sensible effect, and words necessarily implied, may be supplied by judicial construction; but when an act will admit of a reasonable construction that will give sensible effect to every part of it, the court cannot properly, by judicial construction, *curia casus omissus*, reject words merely because otherwise the scope of the law will be more limited in its operation than the legislature probably intended, and more than absolute justice requires.

In what has been said we have assumed that it was probably the legislative purpose to remedy mistakes in the omis-

sion of property from the assessment roll if discovered within three years from the commission of the mistake, regardless of a change in the ownership of the property in the meantime, or the consumption or destruction of the property itself. We are not willing, however, to admit that the position of the court on that point is correct. The use of the word "additionally" in the law, in my judgment, is an insurmountable barrier to reaching such conclusion. All that is said in the opinion as to the public interests requiring that every person shall bear his just proportion of the public burdens, meets with our hearty approval. What is here condemned is that which appears to be judicial legislation to effect the desired end.

I will not further continue the discussion. The grounds of dissent have, in the main, been stated. No good can come from going on merely to further fortify the position here taken by a more careful analysis of the reasons given by the court for an affirmance of the judgment. It seems that the judgment should be reversed.

BARDEEN, J. I concur in the foregoing.

107	436
s111	[4]855
s111	[4]358
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112	[5] 78
107	436
s117	415

COLLINS, by guardian *ad litem*, Respondent, vs. THE CITY OF JANESVILLE, Appellant.

September 8 — September 25, 1900.

Municipal corporations: Personal injuries: Evidence: Cross-examination: Defect in sidewalk: Notice: Knowledge of existence: Degree of care: Instructions to jury: Ordinary care: Proximate cause: Excessive damages.

1. In an action for personal injuries alleged to be permanent, sustained by reason of a defective sidewalk, where the plaintiff's physician testified the injury might be serious, it is error to sustain an objection to a question put him on cross-examination, as to whether he regarded the injury as permanent.

2. Under ch. 85, Laws of 1893 (providing that the notice to the municipality of injury happening on a highway that is out of repair shall not be deemed insufficient solely by reason of any inaccuracy or failure in describing the place and the insufficiency or want of repair), in the absence of any showing that the defendant was misled in fact, or of an intention to mislead on the part of plaintiff, a notice is sufficiently particular that describes the defect as consisting of missing boards or planks from the sidewalk or footway on the easterly side of C. street, in front of premises No. 203, owned by C., even though such premises were sixty feet in width.
3. Where plaintiff in such case admitted she knew of the defect in the sidewalk into which she claims she fell, an instruction that a person passing over a sidewalk known to be in a defective and dangerous condition must use greater care and caution than if she were ignorant thereof, should have been given upon request or its substance incorporated in the general charge.
4. An instruction in the same connection that a traveler may indulge in a presumption that the street on which he travels is not defective, while it may be correct in the abstract, is misleading, because not applicable to one who knows of the existence of the defect in question.
5. In an action for personal injuries sustained by a child thirteen years of age, an instruction that ordinary care means such care "as the great mass of ordinarily prudent children of her age and capacity exercise under like circumstances," is erroneous, because it subdivides the class of ordinarily prudent children, and makes the action of one division of the class the test of ordinary care.
6. An instruction, in substance, that the injury must be shown to be the *direct* and natural result of the defect, is also erroneous; the instruction should be to the effect that the injury must be the natural *and probable* result of the defect. In such an instruction the word "direct" has no proper place.
7. Where an injury to a child thirteen years of age was a simple fracture of the fibula, which reunited in the ordinary course and under ordinary surgical treatment, and, in the opinion of a majority of the medical experts, there had been a complete recovery; and it appeared that the plaintiff walked with no limp ordinarily perceptible, and only complained of some pain in rainy weather, a verdict of $2,500, reduced by the trial court to $1,700, is excessive, even as reduced.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *F. C. Burpee*, city attorney, and for the respondent on that of *J. J. Cunningham*.

WINSLOW, J. This is an action for personal injuries alleged to have been suffered by the plaintiff by reason of a fall upon a defective sidewalk on Cherry street in the defendant city, on the 5th day of June, 1895, resulting in a simple fracture of the fibula about an inch above the ankle joint. The plaintiff was a minor, thirteen years of age, at the time of the accident, and the injury is claimed to be permanent. The answer denies the alleged defect in the sidewalk, and alleges contributory negligence. The case was here upon an appeal from a former judgment, and reversed for error. *Collins v. Janesville*, 99 Wis. 464. Another trial has been had, resulting in a verdict for the plaintiff for $2,500. A new trial was granted by the circuit court unless the plaintiff remit $800 from the verdict. The plaintiff made the remission, and judgment was entered for the plaintiff for $1,700 damages and costs, and the defendant appeals.

1. Dr. Pember, the physician who treated the injury, testified, upon direct examination, that the injury might be serious. Upon cross-examination by the defendant's counsel, he was asked if he regarded the injury as permanent, and an objection to the question was sustained. We regard this as error. The plaintiff claimed a permanent injury, and the doctor's statement that it might be serious was, at best, indefinite, and might well be understood by the jury as indicating his opinion that it might or would be permanent, and it was certainly proper for the defendant to ascertain by direct questions whether that was the meaning of his previous answer.

2. The defect claimed to exist in the sidewalk was a hole caused by a broken board, part of which was missing. The

statutory notice of the injury given by the plaintiff to the city described the defect as consisting of "missing boards or planks from the sidewalk or footway on the easterly side of Cherry street," in front of "the house and premises No. 203 Cherry street, owned by Wilber F. Carle." These premises are sixty feet in width, and objection was duly made to the reception of the notice in evidence because the notice did not fix the place of the accident with sufficient particularity. We think the objection was properly overruled. Ch. 85 of the Laws of 1893 provides, in substance, that no such notice shall be deemed insufficient solely by reason of "any inaccuracy or failure in describing the place and the insufficiency or want of repair," in the absence of any intention to mislead and of any misleading in fact. It does not appear in the case that the city was misled in fact, or that there was intention to mislead.

3. The plaintiff testified that she knew before the accident that the hole in the sidewalk into which she claims she fell was there, and that there were similar holes in close proximity in the same sidewalk. In view of this evidence, the defendant requested the following charge, which was refused: "The plaintiff admits that she knew that the sidewalk in question was in a defective condition, and had known it for some time previous. A person passing over a sidewalk known to be in a defective and dangerous condition must use greater care and caution than if she was ignorant thereof." Upon this subject the court charged as follows: "Persons walking over a sidewalk have a right to presume that it is in a reasonably safe condition for traveling, and a traveler is not called upon to look especially as to whether such walk is in a sufficiently safe condition, and properly built and maintained, or not, and so ordinary care on the part of a traveler is presumed upon this ground, and upon this ground a recovery is not defeated unless it appears that the traveler was guilty of some want of ordinary care at the

time of the accident which was a contributing cause to the accident. Likewise, if a person has seen the defect complained of before the time of the accident, and omits to notice it at the time of the accident, this, in itself, does not preclude a recovery, unless the jury finds such person to be guilty of a want of ordinary care in traveling over the walk at the time of the accident, and in view of her knowledge of the situation. The question is one to be submitted to the jury and determined upon the facts as you find them." We think that the instruction asked by the defendant should have been given as asked, or its substance incorporated in the general charge. A person who suffers injury by reason of a defect in a highway of which he has previous knowledge is not necessarily barred from a recovery on account of such knowledge, but the fact of such knowledge demands the exercise of greater care and caution in passing the defective place than if he had been ignorant of it. *Cairncross v. Pewaukee*, 86 Wis. 181. And while that part of the charge above quoted with regard to the presumption in which a traveler may indulge that the street on which he travels is not defective is correct in the abstract, it was undoubtedly misleading in the present case, because not applicable to one who knows of the existence of a defect.

In this connection, two minor defects should be noted in the charge, in view of the fact that the case must go back for a new trial: Ordinary care was defined as such care "as the great mass of ordinarily prudent children of her age and capacity exercise under like circumstances." This seems clearly incorrect, because it subdivides the class of ordinarily prudent children, and makes the action of one division of the class the test of ordinary care. The test is such care as would be exercised by ordinarily prudent and careful children, or the great mass of children of her age, under similar circumstances. Again, in enumerating the facts which the plaintiff must prove in order to recover, the court said that

the injury must be shown to be the *direct and* natural result of the defect. The language is incorrect under very well-settled rules. The question of proximate cause is perhaps not a very important one in the case, but, if anything is to be said upon the subject, the instruction should be to the effect that the injury must be the natural *and probable* result of the defect. The word *direct* has no proper place here.

4. We regard the damages as excessive, even as reduced by the trial court. The evidence tending to show permanent injury is, at best, very doubtful. The injury was a simple fracture of the fibula, which reunited in the ordinary course and under ordinary surgical treatment, and, in the opinion of a majority of the medical experts, there has been a complete recovery. The plaintiff walks with no limp, or, at least, with one not ordinarily perceptible, and only complains of some pain in rainy weather. We see nothing to justify so large a recovery.

We have found no other questions which demand treatment.

By the Court.—Judgment reversed, and action remanded for a new trial.

THE STATE EX REL. ATTORNEY GENERAL, Respondent, vs. PORTAGE CITY WATER COMPANY, Appellant.

September 10 — September 25, 1900.

Franchise: Grant by common council: Corporate franchise: Corporations: Forfeiture of charters: Statutes: Circuit courts: Jurisdiction: Quo warranto.

1. A special privilege granted by sovereign authority, either to an individual or a corporation, is a franchise.
2. It is not essential to a franchise that the grant be made direct; it is sufficient if it be made through a legitimate legislative agency.
3. A grant made by the common council of a city, by authority of its charter, to construct, maintain, and operate a system of waterworks

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107 514
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110 [8]639
f110 [4]643
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114 [8]250
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115 [8]611
e116 [9]151
e116 [10]151

in such city and to use the streets and alleys thereof for that purpose, is a legislative grant through the medium of an authorized legislative agency, and is a franchise.

4. A franchise granted to an organized corporation, or to an individual or individuals, and thereafter transferred to a corporation, is not a corporate franchise strictly so called, or in any sense, except that of being property of the corporation.

5. Sec. 3241, Stats. 1898, covers only the subject of the forfeiture of charters of domestic corporations for the reasons therein mentioned.

6. The enactment of sec. 3466, Stats. 1898, into statute law was not an adoption of 9 Anne, ch. 20, sec. 4, with the English construction thereof, but of sec. 28, tit. 2, ch. 9, pt. III, 2 R. S. N. Y. 1829, and the construction thereof by the New York courts.

7. Unlike the statute of Anne, sec. 3466 contains no word or words of limitation as regards the meaning of the word "franchise," but it is used in its general sense, so as to include franchises regardless of whether they are corporate or not.

8. The constitutional jurisdiction of the circuit courts of this state, subject to exceptions mentioned in the constitution, extends to all civil matters, including those covered by sec. 3466, and such jurisdiction under such section may be exercised under sec. 3463, the statutory substitute for *quo warranto* proceedings and the remedy by writ of *scire facias* at the common law.

9. The word "person" in a legislative enactment includes a corporation if that appears to have been the legislative intent, and that is governed by the rule of statutory construction in sec. 4971, Stats. 1898, and elementary principles as well. Such word in sec. 3466 is so governed.

10. Proceedings by *quo warranto* at the common law were proper to reclaim a franchise, whether corporate or not, for abuse of it or nonperformance of a condition of the grant, and jurisdiction in that regard is complete regardless of sec. 3466, the remedy being under sec. 3463, the statutory substitute for the common-law remedy.

11. A proceeding to forfeit a franchise owned by a corporation, which franchise is not dependent upon corporate existence, may be maintained against the corporation entirely independent of whether it be a domestic or foreign body.

12. If the owner of a franchise fail to perform the conditions of the grant, the franchise is thereby ended, and an action may be brought by the attorney general in the name of the state to obtain a judicial declaration of the forfeiture, either under sec. 3466, Stats. 1898, or by the rules of the common law.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action in the name of the attorney general to forfeit a waterworks franchise, so called, granted by the city of Portage, Wisconsin, to individuals, and subsequently assigned by them to the defendant. The complaint states, in substance, that the defendant is a foreign corporation; that April 15, 1887, the common council of the city of Portage, a municipal corporation of this state, granted to Moffett, Hodgkins & Clarke, their heirs and assigns, the right to maintain a system of waterworks in said city, said grant being made by ordinance, a copy of which was made a part of the complaint; that such ordinance was duly accepted, and that, pursuant thereto, since 1897, the defendant has maintained the authorized system of waterworks, to furnish water for public and private use in said city; that said ordinance, among other things, required the maintenance of fire hydrants, and provided that such hydrants should be kept, night and day, unavoidable accident excepted, supplied with water for fire services, and protected from freezing, and that if the grantees of the franchise, their successors or assigns, should at any time fail to supply an adequate amount of water for fire and other public and private purposes as provided therein, for a period of two weeks continuously for any cause other than fire, floods, acts of God or the public enemies, the contract made by the ordinance and the acceptance thereof should be null and void, and all rights, privileges, and franchises granted by such ordinance should be forfeited and cease; that defendant failed to keep the fire hydrants supplied with water and failed to keep them protected from freezing, and further failed to supply water for fire and other public and private purposes, from the 1st day of February, 1898, to the 1st day of July, 1899, solely through its negligence and carelessness. Several other violations of material provisions of the ordinance referred to

were alleged. Judgment forfeiting and annulling the franchise was prayed for. Defendant demurred to the complaint upon the grounds, among others, of want of jurisdiction of the court over the subject of the action, and insufficiency of facts to constitute a cause of action. The demurrer was overruled, and defendant appealed.

For the appellant the cause was submitted on the brief of *Hume, Oellerich & Jackson.*

For the respondent there was a brief by the *Attorney General*, and *C. A. Fowler* and *Burr W. Jones*, of counsel, and oral argument by *Mr. Jones* and *Mr. Fowler.*

MARSHALL, J. In the decision of this appeal, the order in which the case is presented in the briefs of counsel will not be followed. Neither will time and space be taken to review the interesting history of *quo warranto* proceedings with which the court is favored. The law as regards the general scope of such proceedings at common law is too well settled to require going back to its origin and tracing it down to the present time in order to make a proper application thereof to the facts alleged in the complaint, under our statutory substitute for the common-law proceeding.

It is conceded that unless the privileges granted by the city of Portage to construct, maintain, and operate a system of waterworks within its corporate limits, and use the streets and alleys of the city for that purpose, constitute a franchise emanating from sovereign authority, this action will not lie either under the statutes or independent of them.

Counsel for appellant say the grant contained in the waterworks ordinance is not a franchise within the meaning of that designation of a legislative grant. There is authority for that contention, and much authority against it. This court has several times spoken on that subject in no uncertain language. The law in that regard is so firmly settled here that it is useless to go elsewhere for guidance, as what follows amply shows.

In *Ashland v. Wheeler*, 88 Wis. 607, the court held that the common council of a city, when acting by legislative authority, may make such a grant as the one in question, and if the grant be owned by a corporation it is as much a "franchise of the corporation" as if granted to such corporation by act of the legislature, for the common council exercises a delegated authority and what it does within that power is done by the legislature through its agency.

In *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, it was said that the rights, immunities, and privileges granted by an ordinance of similar character as the one in question but on a different subject, when possessed by a corporation, are "as much the franchises of the corporation as if they had been directly granted by the state under which it was organized. The common council is authorized to grant them by statute and such power is a delegated one. What the common council does within that power is done by the legislature through its agency."

In *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, the right to construct and maintain a street railway, granted by the common council of Milwaukee to individuals and subsequently acquired by the defendant corporation, was spoken of thus: "The right is something more than an easement, and more than a mere contract right. It is also a franchise granted by the state, acting through the common council of the city, to the railroad company. It becomes, when owned by a corporation, one of its corporate franchises, for failure to exercise which an action may be brought by the attorney general, in the name of the state, to vacate its charter, under sec. 3241, R. S. 1878."

In *Stedman v. Berlin*, 97 Wis. 505, an action in equity to annul a waterworks franchise, it was held that such an action cannot be brought by the city or the taxpayers thereof in its right on the ground of fraud; that the granting of such a franchise is an affair between the city and the grantee, and

that it can only be reclaimed by *quo warranto* or *scire facias* at the suit of the state.

The cases cited where common-law terms are used, as that the franchise can be forfeited only by *quo warranto* or *scire facias*, must be read in connection with sec. 3463, Stats. 1898, which provides that all remedies heretofore obtainable by writs of *scire facias* and *quo warranto*, and by proceedings by information in the nature of *quo warranto*, may be obtained by civil action, and that it shall not be necessary to sue out such writs in form.

We may properly remark in passing, that it is not supposed that the terms "franchise of the corporation" and "corporate franchise," when used in the cases referred to, were intended to refer to corporate franchises, strictly so called,— franchises essential to corporate existence and granted as part of the organic act of incorporation, and that can be forfeited only by *quo warranto* proceedings or the statutory substitute therefor to vacate the charter of the corporation,— but the terms were used in that broad sense applicable to all franchises which a corporation may lawfully acquire. Much confusion often happens from a failure to distinguish between those franchises that are corporate in a strict legal sense and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation. We should further remark in this connection that an action may be brought against a domestic corporation under sec. 3241 to forfeit its existence for abuse of public duty assumed by it under a franchise not corporate and to reclaim such franchise, as was said in *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612; but it does not by any means follow in all cases, as we shall see, that the statutory substitute for *quo warranto* proceedings

at common law cannot also be invoked to reclaim to the state a franchise not corporate, when it will not lie to vacate the charter of the corporation owning such franchise.

A question is raised as to the jurisdiction of the circuit court where a writ of *quo warranto*, or proceedings by information in the nature of *quo warranto*, were necessary at common law, upon the theory that the use of such writ and proceedings is an exercise of sovereign authority. That is sufficiently answered by sec. 8, art. VII, of the Constitution, and previous decisions of this court. Such section confers upon the circuit courts original jurisdiction in all matters, civil and criminal, within the state, not excepted by the constitution and not prohibited by law, together with power to issue writs of *habeas corpus* and *mandamus*, injunction, *quo warranto*, and *certiorari*. Jurisdiction of proceedings for the relief obtainable at common law by writ of *quo warranto*, or by proceedings by information in the nature of *quo warranto*, is neither excepted from the general grant of power mentioned, anywhere in the constitution, nor is it prohibited by law; therefore the court has such jurisdiction. The general grant of original jurisdiction is substantially without limit by anything found in the constitution, over all actions, civil and criminal. The scope of this general grant of authority was said in *Putnam v. Sweet*, 2 Pin. 302, and also in *Att'y Gen. v. Railroad Cos.* 35 Wis. 531, to include greater power than was probably ever before, in a free government, delegated to any one tribunal,—the united powers of the English king's bench, common pleas, exchequer, and chancery.

But it is said that this action cannot be brought under sec. 3241, because that only authorizes an action to be brought by the attorney general to vacate the charter and the existence of a private corporation created under the laws of this state, and that the appellant is a foreign corporation. That must be conceded. Such is the wording of the statute. It

is not contended that this action was brought or can be maintained under that section.

It is further said that the action cannot be brought under sec. 3466, and that there is no other statute referring to the subject. Sec. 3466 provides that, "An action may be brought by the attorney general in the name of the state, upon his own information or upon the complaint of any private party, against the parties offending, . . . when any person shall usurp, intrude into, or unlawfully hold or exercise any . . . franchise within this state." It is said that this statute was taken from 9 Anne, ch. 20, sec. 4, and that when so taken the English construction was that it only authorized proceedings against an individual or individuals, and as regards offices or franchises in corporations. It may be admitted that the construction of the English statute by the English courts is as claimed, and that it extends only "to instances affecting those rights between party and party,"—so said by Lord MANSFIELD in *Rex v. Williams*, 1 Burrows, 402. It may also be admitted that the language of our statute, in the main, came indirectly from 9 Anne, ch. 20, sec. 4, but it is not true that this state adopted the English statute in sec. 3466, or language of the same import, or that our statute is governed by the construction given by the English courts to the statute of Anne. Our statute came from New York. *Att'y Gen. v. S. & St. C. R. Co.* 93 Wis. 604. It is a literal copy of the New York statute. It is quite materially different from the English statute, as we shall see. The material part of sec. 4 of the statute of Anne is as follows: "In case any person or persons shall usurp, intrude into, or unlawfully hold or execute *any of the said offices or franchises*, it shall and may be lawful to and for the proper officer in each of the said respective courts, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto* at the relation of any person or persons desiring to sue or prosecute the same," etc. It is im-

possible to understand the scope of that language without reading the preceding sections and the title of the act, which title confines the scope of the act to "rendering proceedings upon writs of *mandamus* and information in the nature of *quo warranto* more speedy and effectual, and for more easily trying and determining the rights of *offices and franchises in corporations and boroughs*." It will be seen that, by reading sec. 4 with what precedes it as regards franchises, it refers only to corporate franchises.

Our statute provides that, "An action may be brought by the attorney general in the name of the state upon his own information or upon the complaint of any private party against the parties offending, . . . when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, *or any franchise within this state*, or any office in a corporation created by the authority of this state." Stats. 1898, sec. 3466. There is no word of limitation to be found, relating to franchises, as in the statute of Anne. It covers, in its literal sense, any franchise within this state, without regard to whether it is a corporate franchise or not.

True, as claimed by counsel for appellant, secs. 3241 and 3466 are found in close connection in the Laws of 1856, ch. 120, sec. 3241 being there sec. 334 and sec. 3466 being there sec. 336; but there is no connection whatever between the two sections as originally adopted. There is nothing in sec. 3466 which indicates in any way that it refers only to corporate franchises. Inasmuch as the law of 1856 was aimed at all civil remedies and was intended to establish a complete system of procedure in civil matters, it is not reasonable to say that a remedy for wrongs, as regards franchises other than corporate franchises, was omitted; yet such was the result of the legislative effort if appellant's counsel are correct in their contention. It cannot be contended but that the natural meaning of the word "fran-

chises" as used in the act, includes all franchises within the meaning of the term as understood at common law. And if we look to the end sought by the legislature, we must observe the literal sense of the word will effect that end, and no other sense will.

If we go further and look to the meaning of the act as understood in New York at the time of its adoption here, we reach the same result. *Thompson v. People ex rel. Taylor*, 23 Wend. 537; *People ex rel. McKinch v. Bristol & Rensselaerville Road*, 23 Wend. 222; *People ex rel. Att'y Gen. v. Utica Ins. Co.* 15 Johns. 358. We fully agree with counsel for the respondent that if the New York cases referred to decide anything, they decide that in a case like this an information in the nature of *quo warranto* before the Code, and the statutory substitute therefor afterwards, was proper under the New York statute, which was sec. 28, tit. 2, ch. IX, pt. III, 2 Rev. St. 1829, at the time of the decisions,— the statute that became our sec. 3466 by adoption; that such proceedings were proper when any person, natural or artificial, usurped or intruded into, or unlawfully held or exercised, any franchise in the state, giving to the word "franchise" the broad signification which it had at common law, so as to include every privilege or immunity of a public nature which could only be legally exercised by authority of a legislative grant.

It was said in effect, in *People ex rel. Att'y Gen. v. Utica Ins. Co.*, *supra*, that any privilege which was a franchise by the English common law is a franchise in New York, and that if a corporation unlawfully attempt to exercise such a franchise it can be proceeded against in an action brought by the people in the name of the state under the section we have discussed.

In *Thompson v. People*, *supra*, where it was sought to forfeit a bridge franchise owned by an individual, for breach of a condition upon which it was granted, it was said that

a breach of the condition ended the franchise, and any use of it thereafter rendered the user liable to be proceeded against by an information in the nature of a *quo warranto;* that while the New York statute was taken from the statute of Anne, it is much broader and clearly embraces such cases as the one under consideration; and if that were not so, that the remedy was good at common law.

Much that we have said regarding the construction of the word "franchise" applies to the word "person" in sec. 3466. It cannot be questioned but that the word "person" in a legislative enactment applies to an artificial person when it is clear that such was the legislative intent, both by statutory rules of construction (sec. 4971, Stats. 1898) and elementary principles as well. *Chippewa Valley & S. R. Co. v. C., St. P., M. & O. R. Co.* 75 Wis. 253, note; *Fadness v. Braunborg*, 73 Wis. 279; *Larson v. Aultman & Taylor Co.* 86 Wis. 286; *Segnitz v. Garden City B. & T. Co., ante*, p. 171. That such was the intent in the law in question is clear, because that accords with the construction in the place of its origin, which the legislature must be presumed to have understood and adopted with the law itself, and because any other construction leaves the Code incomplete. That is contrary to what we must presume was the legislative purpose.

We have not failed to give attention to the claim that some courts elsewhere, having statutes similar to sec. 3466, have construed them as extending no further than the statute of 9 Anne, ch. 20, sec. 4. It is sufficient to say that we are precluded from being guided by such authorities, because a contrary construction of our statute, in the state from which we adopted it, is a part of the statute the same as if it were embodied therein in the most unmistakable language. Moreover, as said in the New York case, it cannot be seriously doubted but that at the common law this action would lie regardless of the statute of Anne, and it cannot be doubted but that all the jurisdiction the English

courts had in such matters is now vested in our circuit courts as a part of their constitutional authority, and may be exercised under sec. 3463 by civil action.

Proceedings to forfeit franchises were common in England centuries before the statute of Anne. That was, in the main, a mere regulation of procedure. It did not cover the whole subject, and did not add anything to the law as it had existed theretofore, except to give the right to institute the proceedings to a private relator, so that wrongs could be remedied "as between party and party." In 7 Comyn, Dig. 190, 191, it is said that "privileges and immunities of a public nature, which cannot be exercised without legislative authority, are franchises;" and that "a *quo warranto* is in the nature of a writ of right for the king against him who usurps or claims any franchises or liberties, to say by what authority he claims them." A large number of authorities will be found there cited covering a long period of time prior to the statute of Anne, and supporting the literal meaning of the text we have quoted.

In *Peter v. Kendal*, 6 Barn. & C. 703, an action for damages for the disturbance of a ferry franchise, it was argued that the plaintiff failed to show title to the franchise; that being out of possession there was no presumption of ownership because of the fact that the plaintiff once exercised the right; because it might have been inquired into and reclaimed by sovereign power by *quo warranto*. The court held that proceedings by *quo warranto*, where the right was extinguished, were proper only where the party proceeded against was in the illegal possession of the franchise; but that something more than mere negligence was necessary to destroy the right, because that may be waived, yet for mere negligence, even, the crown might repeal a grant by *scire facias* or *quo warranto*.

The question of whether proceedings by *quo warranto* are proper against a corporation to merely annul a franchise not

corporate was fully treated by Justice COWEN in *People ex rel. McKinch v. Bristol & Rensselaerville T. P. Road*, 23 Wend. 537, it being held on authority that such a proceeding is proper. It does not involve the existence of the corporation in any sense; hence no reason exists why a foreign corporation, holding a legislative grant to do some particular thing in this state, is not subject to the sovereign power of the state in regard to such grant, the same in all respects as if it were a domestic corporation. No difference would exist at common law, and it is not perceived how any can exist under sec. 3466.

Some minor questions are discussed in the brief of counsel for appellant, to which we have not referred and which are not necessary to a decision of the appeal. The conclusion we have reached, and which must follow from what has been said, is that this action was properly brought, that the demurrer to the complaint was properly overruled, and that such order must be affirmed.

By the Court.— So ordered.

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107 453
d117 497

SPENCE, Respondent, vs. PIEPER and wife, Appellants.

September 10 — September 25, 1900.

Mortgages: Agency to receive payment: Possession of securities: Negligence.

1. A mortgage was negotiated in the office of R., who carried on a loaning business, and thereafter all payments were made at his office. The owner of the mortgage denied that R. was her agent, and that he was authorized to receive payments of either principal or interest, and none of the receipts given by R. were signed by him as agent. The mortgagor, when he made payments, supposed R. was the owner of the mortgage. At no time when payments were made did R. have possession of the securities. There was no evidence that plaintiff held R. out as her agent, or that he professed

to be such, and the mortgagor was not misled or deceived by appearances, or induced to make any payment to R. because of any act of plaintiff. The greater part of the money so paid to R. failed to reach the plaintiff. In an action to foreclose the mortgage, it is *held* that the evidence — showing the above facts, among others — failed to establish that R. was plaintiff's agent.

2. When the mortgagor, in such case, made payments to R. without having the papers produced or indorsements made in his presence, he was guilty of laches, and is not entitled to have the payments applied on the mortgage.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

December 7, 1881, Wilhelm Pieper, defendants' ancestor, executed a mortgage to one C. W. Whinfield to secure the payment of two notes, one for $2,000, payable in instalments of $500 each, on the 1st of May, 1882, and annually thereafter; the other for $1,200, due May 1, 1887,— each bearing seven per cent. interest. Pieper died April 8, 1884, and the property mortgaged came to the defendants. Whinfield died April 5, 1885, and the mortgage became the property of the plaintiff. This action is brought to foreclose said mortgage, the balance claimed to be due being $2,400 and interest. The defendants answered, claiming payment of the entire mortgage debt except $200, for which they tendered judgment, with interest and costs. Plaintiff had judgment for the amount claimed, with interest and costs. Defendants have appealed.

For the appellants there was a brief by *M. L. Lueck* and *J. E. Malone*, attorneys, and *W. H. Timlin* of counsel, and oral argument by *Mr. Timlin* and *Mr. Lueck.*

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence.*

BARDEEN, J. This is another of those unfortunate cases growing out of the knavery of W. T. Rambusch. The defendants claim that they made payments from time to time

upon the mortgage in suit to Rambusch, sufficient to reduce the amount due thereon to about $200. The contest is whether he was plaintiff's agent, and authorized to receive the payments so made. The fact that certain payments were made to Rambusch is not denied, and it is equally certain that the greater part of the money so paid failed to reach the plaintiff. One of two innocent parties must suffer, and the question is, which one. The lower court, after a full hearing, has found for the plaintiff, and, unless we can readily see that such conclusion is erroneous, it must stand. We appreciate quite fully the importance of the case to the parties interested, and, with that idea in view, have carefully considered the testimony and the legal questions involved.

There are a few facts in the case which stand out prominent, are not in dispute, and are deemed to be of controlling weight. Rambusch was the president of a bank at Juneau. He carried on a real-estate, abstract, and loaning business. Many people came to him for loans, as the records of this court show, and not a few were betrayed, as in this case. The mortgage in suit was negotiated and executed in his office. All payments that have been made thereon came through that same office. The plaintiff denies specifically that he was ever her agent, or authorized to receive any payments of either principal or interest on this mortgage for her, and it is insisted that Rambusch was at all times acting as the agent of the defendants. It is a significant fact to note in this connection that, of the score or more receipts offered in evidence by the defendants as showing payments to Rambusch, not one of them is executed by him as agent. Again, the defendant testified that he made the payments to Rambusch as the supposed owner of the mortgage. At no time when these payments were made did Rambusch have possession of the note or mortgage. There is no evidence that the plaintiff ever held him out as her agent, or that he ever professed to act as such. The defendant was not mis-

led or deceived by appearances, or induced to make any payment to him because of any act of the plaintiff. The real basis of this unfortunate situation is the mistaken assumption by the defendant that Rambusch owned the mortgage. He made repeated payments, and never asked to have the papers produced or indorsements made in his presence. He was guilty of laches, and must suffer the consequences. The case of *Bartel v. Brown*, 104 Wis. 493, is of direct application on this point. "If money be due on a written security, it is the duty of the debtor to see that the person to whom he pays is in possession of the security. That is the best evidence of authority. The payor is negligent if he relies on anything less, and must abide the event of being able to establish, by clear and satisfactory evidence, an express agreement between the holder of the security and the supposed agent, authorizing the latter to represent the former in the transaction." See *Kohl v. Beach*, *ante*, p. 409, which renders further discussion unnecessary.

Testing the situation presented in this case by the rule thus stated, we agree with the trial court that the evidence fails to establish that Rambusch was plaintiff's agent. However harsh and severe may be the result in this case, we are convinced that any relaxation of the rule would lead to infinite mischief, and open the door to greater frauds.

By the Court.—The judgment of the circuit court is affirmed.

BRAUCHLE, Respondent, vs. NOTHHELFER, Appellant.

107 457
109 246
107 457
d112 *489

September 10 — September 25, 1900.

Forcible entry and detainer: Jurisdiction: Notice to quit: Proof of service: Landlord and tenant: Lease: Construction: Court and jury: Prejudicial error: Pleading: Counterclaim.

1. In an action for unlawful detainer. the complaint, being in the form prescribed by law, confers jurisdiction of the subject matter. The summons is merely the means of acquiring jurisdiction of the person, and an objection that it is not in the form prescribed by law is waived by appearing generally without objection to the jurisdiction over the person.
2. A notice to a tenant who was in default in the payment of rent, in substance: "I hereby demand that you deliver up and surrender to A. B., the undersigned, within three days of the service of this notice upon you [the described premises]. for the reason that you have failed to comply with the conditions and agreements of the lease under which you went into possession thereof, by neglecting and refusing to pay the rent due thereon [specifying the date when due]: Now, therefore, unless the said rent is paid or possession of said premises delivered to me as herein demanded, I shall proceed to obtain possession thereof," — satisfies the statute (sec. 3358, Stats. 1898), which requires that the notice shall demand in the alternative the payment of the rent or the possession of the premises.
3. Where there was no pretense that a notice to a tenant to pay rent or surrender possession of the premises was not served as specified in the return of an officer indorsed thereon, its admission without objection, and its confirmation by the testimony of the officer, proved, *prima facie*, the service of the notice, even though the return might have been inadmissible if objected to.
4. Where a lease provided that, in case the landlord desired to sell the premises during the term, the tenant should have "the first privilege of buying said property" at a certain sum, there was nothing in this promise,— the contingency giving the right to exercise such option not having arisen, and the tenant not having parted with any value or otherwise changed his position by reason of it,— which gave him any rights in the premises save such as he held as tenant under the lease.
5. Where the evidence was all on one side and uncontradicted, and so conclusively established all of the facts material to plaintiff's re-

covery that it would have been the duty of the court to direct a verdict in her favor, the refusal of the court to allow a jury trial is not prejudicial to defendant, and the error, if any, cannot be ground for reversal on appeal, under the positive command of sec. 2829, Stats. 1898, that no judgment shall be reversed for any error or defect which shall not affect the substantial rights of the adverse party.

6. An answer in an action for forcible entry and detainer, which alleged a promise and failure to repair, whereby defendant's ice was destroyed and the premises rendered of no value, with no *ad damnum* clause, and no facts pleaded expressly as a counterclaim, or so denominated, is demurrable as a counterclaim.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action of forcible entry and detainer, commenced before a justice of the peace. The complaint, in form prescribed by statute, alleged possession by the defendant under a lease as tenant of the plaintiff, default in the payment of two instalments of rent, and service of notice in the alternative to quit or pay rent more than three days before the commencement of the suit. The answer was a general denial, some special denial, and an allegation of breach of certain verbal covenants to repair and keep in repair the roof, whereby defendant's ice had been melted, and the premises rendered of no value. Judgment was demanded for dismissal and damages by way of counterclaim. To this attempted counterclaim a demurrer was interposed. From a judgment before the justice of the peace in favor of the plaintiff the defendant appealed to the circuit court, where the case was noticed for trial by the plaintiff, and was entered upon the calendar as an issue of fact for the court. After the second day of the term the demurrer to the counterclaim was argued and was sustained, and the case called for trial before the court, the jury having meanwhile been discharged for the term. The defendant objected to going to trial before the court without a jury, which objection was overruled, and the defendant reserved exception thereto. Upon the trial evidence

was given of the lease, the default in the payment of rent, and of the giving of the notice to quit. At the close of the plaintiff's case it was conceded in open court that the defendant was and had been ever since its date in possession of the property under the lease. After the close of plaintiff's case the court inquired of the defendant if he had any evidence to offer that he was not in default in the payment of rent, and, being answered in the negative, announced its decision in favor of the plaintiff, whereupon findings were made and judgment entered in the usual form for possession of the premises. Defendant appealed.

E. E. Brossard, for the appellant.

G. W. Stephens, for the respondent.

DODGE, J. Numerous errors are assigned:

1. That the court failed of jurisdiction because the summons was not in the form prescribed by law for an action of forcible entry and detainer. This objection is without merit. The defendant appeared generally without objecting to the jurisdiction over his person, and has therefore waived any objection, The complaint, having been in the form prescribed by law, conferred jurisdiction of the subject matter. The summons was merely the means of acquiring jurisdiction of the person.

2. It is objected that the notice to quit is not in compliance with the statutory requirement. That notice was to the following effect: "I hereby demand that you deliver up and surrender to *Mrs. Agnes Brauchle*, the undersigned, within three days of the service of this notice upon you [the described premises], for the reason that you have failed to comply with the conditions and agreements of the lease under which you went into possession thereof, by neglecting and refusing to pay the rent due thereon on the 27th day of February, 1899, and the 27th day of March, 1899: Now, therefore, unless the said rent is paid or possession of said prem-

ises delivered to me as herein demanded, I shall proceed to obtain possession thereof." The statute merely requires that the notice shall demand "in the alternative the payment of the rent or the possession of the premises." Stats. 1898, sec. 3358. We think this notice satisfies the statute. Clearly, the final clause notified the defendant that if he paid the rent possession of the premises would not be demanded.

3. It is contended that there was no evidence of the service of this notice. There was indorsed thereon a return of service by the city marshal, which, being offered in evidence and objected to by defendant on the ground that it was not sworn to, was rejected; whereupon the city marshal was called as a witness, testified that he was such city marshal on the date named in the return, that he signed the return, and remembered serving copy of the notice on the defendant; whereupon the plaintiff again offered the return in evidence, and it was received without objection. There is no pretense in the case that the notice was not served as specified in that return, and, while the same may have been inadmissible if objected to, yet, it having been admitted without objection and substantially confirmed by the testimony of the city marshal, we must hold it sufficient to make the plaintiff's *prima facie* case.

4. Defendant urges that he had other rights than those of a mere tenant in the premises because his lease, which otherwise was in the ordinary form, contained a provision that, if the landlord desired to sell the premises within the term of the lease, she gave to the second party "the first privilege of buying said property at the sum of $8,000." No defense on this ground was pleaded, and no pretense is made that the contingency had in any way arisen to give defendant the right to exercise this option, nor that he had parted with any value or otherwise changed his position by reason thereof. There was nothing in this mere promise in certain

contingencies to extend to him an option to purchase which gave him any equitable or other rights in the premises save such as he held as a tenant under that lease. The situation differs radically from that in any of the cases cited by appellant, where equities of redemption were found to exist. *Nightingale v. Barens*, 47 Wis. 389; *Buel v. Buel*, 76 Wis. 413; *Hunter v. Maanum*, 78 Wis. 656.

5. We find it unnecessary to decide whether error was committed in overruling appellant's objection to trial by the court without a jury for the reason that no issue of fact was raised on the trial. The evidence was all on one side, and uncontradicted, and so conclusively established all of the facts material to plaintiff's recovery that it would have been the duty of the court to direct a verdict in her favor. The absence of a jury, therefore, cannot have been prejudicial to the defendant, and the error, if any, in denying him a jury trial, cannot be ground for reversal, under the positive command of sec. 2829, Stats. 1898.

6. The demurrer to the so-called counterclaim was properly sustained, for the reason, if for no other, that no facts were pleaded expressly as counterclaim or were so denominated. A representation as to condition of roofs, and promise and failure to repair, whereby defendant's ice was destroyed, and whereby the premises were of no value, is contained in the answer; all set up as if by way of defense, with no *ad damnum* clause, and no intimation throughout of intent to urge them either as counterclaim or setoff. The entire answer concludes with: "Wherefore defendant demands that the complaint be dismissed, and that he have judgment against plaintiff by way of counterclaim for one thousand dollars;" but there is nothing to indicate what part of the allegations contained in the answer, if any, the pleader intended as support for this prayer for damages. Such prayer is therefore not supported, and anything that defendant's attorney might have intended for counterclaim

is demurrable, because neither pleaded as such nor so denominated. *Rood v. Taft*, 94 Wis. 380.

We discover no error prejudicial to the defendant.

By the Court.—Judgment affirmed.

McGOWAN, Respondent, vs. THE SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS, OF TORONTO, CANADA, Appellant.

107	462
111	188
111	843
107	462
116	413

September 5—October 12, 1900.

Mutual benefit insurance: Materiality of answers in application: Warranty: Breach: Intentional concealment.

In an application for insurance in a mutual benefit company the insured affirmed and declared that the several answers contained therein were each and all true, and that he had made no intentional omission, concealment, or mental reservation of any material fact or circumstance relating to his past or present health, habits, or condition, or to his family history, and agreed that such questions and answers should form part of the contract. The certificate recited that it was issued in consideration of the agreements and statements contained in said application and in the medical examination paper, and also in consideration of the warranty that the same, being material to the risk, were in all respects true and correct. In an action on the certificate the jury found that the answers of the insured to questions in said application concerning the health, death, and age at death, of his ancestors, brothers, and sisters, were false. On a former appeal said questions had been held material to the risk as matter of law. *Held*, that the positive answers of the insured to said questions constituted warranties, and that, being false, no recovery could be had on the certificate, even though the jury also found that each of said answers was made without any "intentional omission, concealment, or mental reservation" on the part of the insured.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Mylrea & Bird*, and oral argument by *W. H. Mylrea* and *C. B. Bird.*

For the respondent there was a brief by *Fruit & Gordon*, and oral argument by *J. J. Fruit*. They contended, *inter alia*, that the statements and declarations contained in the medical examination paper did not constitute a warranty; neither did these statements and declarations, together with the contract itself, constitute a warranty. *Campbell v. New England M. L. Ins. Co.* 98 Mass. 381, 391; *Moulor v. Am. L. Ins. Co.* 111 U. S. 335; *Anders v. Supreme Lodge K. of H.* 51 N. J. Law, 175; *Vivar v. Supreme Lodge K. of P.* 52 N. J. Law, 455; *Clapp v. Mass. Ben. Asso.* 146 Mass. 519; *Illinois M. B. Asso. v. Winthrop*, 85 Ill. 537; *Supreme Lodge K. of P. v. Edwards*, 15 Ind. App. 524; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 424.

CASSODAY, C. J. This is an action to recover insurance upon a certificate of membership of Edward Pion in the defendant company dated June 3, 1896. The case was here upon a former appeal. 104 Wis. 173.

It appears from the record, and is undisputed, that Edward Pion made a written application for such membership May 4, 1896, upon a blank of the defendant, in which he answered several questions, to the effect that he was then in good health, and had never had pleurisy, inflammation of lungs, acute bronchitis, chronic catarrh, diseases of throat or air passages, shortness of breath, spitting blood, chronic cough, or consumption; (66) that he had no diseases during the last five years for which he needed the attendance of a physician (104 Wis. 184); (78) that he had never had acute or inflammatory rheumatism; (113) that his father died at the age of sixty-four years; (114) that he did not remember the cause of his death; (115) that he was ill two or three weeks; (116) that his previous health was good; (120) that his mother died at the age of fifty-eight years, (121) of inflammation of the bowels, (122) and was ill two weeks; (128) that none of his brothers was dead; (134) that none of his sisters was

dead; (138) that his paternal grandfather was killed in the army; (140) that his maternal grandfather was killed in the army; (143) that none of his grandparents or uncles or aunts or near relatives had been afflicted with inflammatory or acute rheumatism, or insanity, or epilepsy, or consumption or other tubercular disease, or scrofula or cancer, or with any other constitutional or hereditary disease, or committed or attempted to commit suicide; (157) that he thereby affirmed and declared that the answers to each and all of such questions, and also those made to the medical examiner, were true and correct, and that no intentional omission, concealment, or mental reservation had been made of any material fact or circumstances relating to his past or present health, habits, or condition, or to his family history, and he thereby agreed that the questions and answers therein contained should form a part of his contract with the defendant. "[Signed] Edward Pion, Applicant. Witnessed: H. F. Gunn, M. D."

The defendant's medical examiner reported to the defendant, under the same date, to the effect that, after carefully examining the applicant, he was satisfied that the applicant was free from any tendency to cough or difficulty of breathing, or any other local or constitutional disease which would naturally affect the risk; that he believed the applicant's answers to the questions mentioned were full and true; that he considered him a first-class risk, and recommended him to membership in the company.

The certificate of insurance issued upon such application June 3, 1896, omitting marginal and head declarations and immaterial parts, is as follows, to wit: "In consideration of the application for membership, and of the agreements and statements therein contained, and of the statements, representations, and declarations contained in the medical examination paper (in so far as . . . material to the contract), and in consideration, also, of the warranty of the applicant

that the same, being material to the risk, are in all respects true and correct, and in consideration, also, of the provisions of the constitutions and laws enacted by the *Supreme Court of the Independent Order of Foresters*, and of any and of all amendments thereto adopted from time to time by the said *The Supreme Court*, and in consideration, also, of the declarations and promises contained in the obligation taken by initiates in subordinate courts (each of which, the said application for membership, the medical examination paper, the constitutions and laws, and the said obligation, are hereby referred to by the parties hereto and made a part of this contract), and upon the faith and credit of all and each of which agreements, statements, promises, representations, provisions, and declarations, and in consideration of the payment by the applicant, at the times required, of any and of all the assessments, dues, fees, capitation tax, and fines required by the said constitutions and laws to be paid on account hereof, this benefit certificate is issued." On the back of such certificate the applicant thereby expressly agreed, in writing, to the conditions of the benefit certificate therein and thereon, and that he was bound thereby; and he agreed that the constitutions and laws, as well as the amendments thereto which might be adopted from time to time by such company, should be a part of such contract.

Edward Pion died February 9, 1898, and April 25, 1898, this action was commenced to recover such insurance.

Issue being joined, and trial had, the jury at the close thereof returned a special verdict to the effect (1) that Edward Pion's paternal grandfather died at the age of fifty-five years; (2) that his maternal grandfather died at the age of fifty years; (3) that his father died at the age of sixty-one years; (4) that Edward Pion's answer as to the age at which his father died was not true and correct, (5) but such answer was not any intentional omission, concealment, or mental reservation on the part of Edward Pion; (6) that Edward

Pion's father was ill prior to his death about six weeks; (7) that his answer as to the duration of his father's illness was not true and correct, (8) but that such answer was not any intentional omission, concealment, or mental reservation on the part of Edward Pion; (11) that Edward Pion's mother died at the age of sixty-one years; (12) that his answer as to the age at which his mother died was not true and correct, (13) but that such answer was not an intentional omission, concealment, or mental reservation on the part of Edward Pion; (16) that Edward Pion's answer as to the cause of his mother's death was not true and correct, (17) but that such answer was not any intentional omission, concealment, or mental reservation on the part of Edward Pion; (18) that Edward Pion's answer as to the number of sisters dead was not true and correct, (19) but that such answer was not an intentional omission, concealment, or mental reservation on the part of Edward Pion; (20) that Edward Pion's answer as to the number of brothers dead was not true and correct, (21) but that such answer was not an intentional omission, concealment, or mental reservation on the part of Edward Pion; (22) that Edward Pion's answer that he was in good health at the present time was true and correct; (25) that Edward Pion's answer that he had never had pleurisy and the other diseases mentioned was true and correct; (27) that Edward Pion's answer that he had had no diseases during the last five years for which he needed the attendance of a physician was true and correct; (29) that the health of Edward Pion's father was good previous to the last illness causing his death; (31) that the plaintiff's damages were assessed at $2,235.66.

From the judgment entered thereon for that amount, with costs, the defendant brings this appeal.

The application and other papers mentioned, together, constituted the contract between Edward Pion and the defendant. *Herbst v. Lowe*, 65 Wis. 316, 320, and cases there

cited. Being in writing, the parties were, in the absence of fraud or mistake, conclusively presumed to know the contents of their own written contract. *Id.; Straker v. Phenix Ins. Co.* 101 Wis. 413, 421; *Jackowsksi v. Illinois S. Co.* 103 Wis. 454; *N. Y. L. Ins. Co. v. Fletcher*, 117 U. S. 519. Such written contract is, of course, to be construed by the court, in so far as construction is permissible. In construing such contract on the former appeal it was held that the "answers of the insured, in his application for insurance, to questions concerning the health, death, or age at death, of his ancestors and brothers and sisters," were "material, as a matter of law," and that it was "error to submit the question of their materiality to the jury." 104 Wis. 173. In his application for such insurance, Edward Pion answered that his father died at the age of sixty-four, after an illness of two or three weeks. Upon the last trial the jury found that neither of such answers was correct, and that his father was ill prior to his death about six weeks. In his application he stated that his mother died at the age of fifty-eight, of inflammation of the bowels. Upon the last trial the jury found that neither of such answers was correct; that she died at the age of sixty-one years, and not of inflammation of the bowels. In his application he stated that none of his brothers was dead. Upon the last trial the jury found that such answer was untrue. In his application he stated that none of his sisters was dead. Upon the last trial the jury found that such answer was untrue; and the undisputed evidence is that it was untrue, and that he then knew that his sister Ella was dead, and that he had attended her funeral. As indicated, Edward Pion in and by his application affirmed and declared that the several answers contained in his application were each and all true and correct, and therein agreed that such questions and answers should form a part of his contract with the defendant. The certificate of insurance was based upon such application and medical

examination, containing such agreements, statements, representations, and declarations, and recited, in effect, that the same was issued in consideration of the *warranty* of the applicant that the same, being material to the risk, were in all respects true and correct, and was issued upon the faith and credit of all and each of such agreements, statements, promises, representations, provisions, and declarations.

The question recurs whether a judgment can be maintained, based upon such statements, which this court has held to be material to the risk, and which the jury have found to be false. The theory upon which it is sought to maintain the judgment is that none of such statements were warranties, but that each was a mere misrepresentation, and, although false when made, yet, as found by the jury, each of such statements was so made without any "intentional omission, concealment, or mental reservation on the part of Edward Pion." Such theory is sought to be maintained by reason of the fact that after Edward Pion had, in his application, affirmed and declared that his answers to each and all of such questions, and those made to the medical examiner, were true and correct, he further said, "and that no intentional *omission, concealment, or mental reservation* has been made of any material fact or circumstances relating to my past or present health, habits, or condition, or to my family history." This relates merely to some "omission, concealment, or mental reservation." It certainly does not mean that when the insured made a false statement he merely unintentionally omitted to tell the truth, or that he unintentionally concealed the truth by stating a falsehood, or that he had some mental reservation in direct conflict with the falsehood stated. It may well apply to questions not answered, as, for instance, a portion of question 65, which reads: "If you have had . . . any other diseases, give full particulars as to character, date, duration, and whether you have fully recovered, and the name of the

physician who attended you." So it may apply to the answer given to question No. 66, fully considered on the former appeal. 104 Wis. 182, 184. So it may apply to the answer to the 114th question,—that he did not remember.

The language quoted is not equivalent to that used in the cases relied upon by counsel for the plaintiff. Thus, in one of the cases cited the language of the contract was "wilful misrepresentation," — "fraudulent concealment or designedly untrue statement." *Fowkes v. Manchester & L. L. A. & L. Asso.* 3 Best & S. 917, 920. In another the language was "no misrepresentation or suppression of *known* facts." *Anders v. Supreme Lodge K. of H.* 51 N. J. Law, 175. The same language was used in *Illinois M. B. Soc. v. Winthrop*, 85 Ill. 537. In another the language was that the statements were true "to the best of my knowledge and belief." *Clapp v. Massachusetts B. Asso.* 146 Mass. 519, 520. So in the case in this court, relied upon, the language in the contract was "so far as the same *are known* to the applicant and are material to the risk." *Redman v. Hartford F. Ins. Co.* 47 Wis. 89.

No such qualifying words are contained in the contract of insurance in the case at bar. On the contrary, the only qualification relates to something omitted, concealed, or mentally reserved, and hence not expressed. There can be no doubt but that such positive answers to such direct questions constituted warranties. This would have been so even without the word "warranty" having been used in the certificate. *Neave v. Arntz*, 56 Wis. 174; *Barnes v. Burns*, 81 Wis. 235. But here the express warranty constituted a part of the consideration upon which the certificate was issued. Such warranties were absolutely binding upon the insured and those claiming under him. *Blumer v. Phœnix Ins. Co.* 45 Wis. 622; *S. C.* 48 Wis. 535; *Copp v. German Am. Ins. Co.* 51 Wis. 637; *Baumgart v. Modern Woodmen*, 85 Wis. 546; *Boyle v. N. W. M. R. Asso.* 95 Wis. 312; *Straker v. Phenix Ins. Co.*

101 Wis. 413, 418. In one of these cases it was held that "the insurance was avoided by a false statement in such application that the insured had never had a certain disease, although he never knew he had it, and his death resulted from other causes." In another it was held that a false affirmative answer to a question in relation to the health of the insured avoided the contract of insurance, "even though the assured believed when she made it that it was true." To the same effect, *Armour v. Transatlantic F. Ins. Co.* 90 N. Y. 450; *Hartford L. & A. Ins. Co. v. Gray*, 91 Ill. 159; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341. In one of these cases it was held, in Illinois, that "no recovery can be had upon a life policy of insurance which is obtained by fraud and misrepresentation on the part of the assured as to material facts affecting the risk; and the age of his parents at their death, and the disease of which they died, and the fact whether the brothers and sisters of the assured were all living, are material, and must be truly stated in the application." But it is unnecessary to multiply authorities on the question.

It may be very doubtful whether the evidence sustains the twenty-second finding of the jury, as to the condition of Edward Pion's health at the time of procuring the insurance, or the twenty-ninth finding of the jury, as to his father's health previous to his last illness. But the views expressed render it unnecessary to consider either of those questions.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment in favor of the defendant.

PAGAL, Respondent, vs. NICKEL, Appellant.

September 7 — October 12, 1900.

Bills and notes: Conditions: Leases: Contemporaneous agreements: "On or before" in promissory note.

1. A lessor gave his lessee a promissory note for $100, payable "on or before four years after date," and reciting that it was executed as security for the payment of $100 to be paid by the conditions of a five years' lease contemporaneously executed, and was to become due provided the lessor sold the demised premises, otherwise to be void and of no value. The lease reserved to the lessor the right to sell, and in such case the lessor was to notify the lessee during the months of February and March of such sale, pay him the $100, and allow him to remain in possession until the January following. The lessor sold the farm, the deed being made subject to such lease, the lessor conveying to her grantee her share of the crops. The lessee's possession was in no way disturbed or interfered with by reason of the deed. *Held*, that construing the note and lease together the manifest purpose was merely to compensate the lessee for loss of the possession of the premises and the benefits of the lease. The lessee was therefore not entitled to judgment on the note while he retained such possession and benefits.
2. A note payable "on or before" a certain date, while it gives the maker the privilege of paying at any time before that date, does not give the holder the right to enforce collection before that time.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

For the appellant there was a brief by *E. L. & E. E. Browne*, and oral argument by *E. E. Browne.*

For the respondent there was a brief by *McFarland & Hanna*, and oral argument by *C. D. McFarland.*

CASSODAY, C. J. This action was commenced in justice's court October 3, 1899, to recover the amount alleged to be due on the promissory note executed by the defendants, and in the words and figures following, to wit:

"$100. Waupaca, Wisconsin, November 30th, 1898.

"On or before four years after date, for value received, we promise to pay to the order of *Richard Pagal*, at Waupaca

County National Bank, Waupaca, Wisconsin, one hundred dollars, with interest at the rate of no per cent. per annum. This note is given as security for the payment of one hundred dollars, provided to be paid by the conditions of a certain lease given *Richard Pagal* by Ida Dixon, and is to become due provided Ida Dixon sells the Terrio farm described in said lease; otherwise to be void and of no value.

"IDA DIXON.
"DANIEL NICKEL."

The defendant, *Nickel*, answered by way of a general denial. The cause having been taken to the circuit court by appeal and there retried, that court at the close of the evidence directed a verdict in favor of the plaintiff for $100. From the judgment entered thereon accordingly for that amount, with costs, the defendant *Daniel Nickel* appeals.

It appears from the record that the lease from Ida Dixon to the plaintiff, mentioned in the note, was dated and executed on the same day as the note, and was "for the term of five years, commencing" on that day, and contained a clause expressly reserving to Ida Dixon the right to sell the premises, and in such case to notify the plaintiff during the months of March and February each year of such sale, and in such case to pay the plaintiff $100, and allow him to remain in possession of such farm until the January following such notice, and the plaintiff was to have the privilege of terminating the lease by giving the same notice and paying Ida Dixon $50,—each party to secure the other for such payment; that September 19, 1899, Ida Dixon conveyed the farm to Carl Pagal by deed reciting a consideration of $3,100; that such deed was therein made subject to the lease after January 1, 1900; otherwise, the deed stated that the land was free and clear of all incumbrance.

Pursuant to the terms of the lease, the plaintiff worked the farm on shares. By the express language of the deed mentioned, Ida Dixon transferred her share of the crops

for the season of 1899 to her grantee, Carl Pagal, who took the farm subject to the lease after January 1, 1900. Thereupon Carl Pagal became the landlord, and the plaintiff his tenant, under and by virtue of the lease. The lease was not terminated, and the plaintiff's possession and rights as such tenant were in no way disturbed or interfered with by reason of such deed. To determine the contract between Ida Dixon and the plaintiff, we must read the note and lease together, as constituting one paper in law. *Herbst v. Lowe*, 65 Wis. 316, 320. In and by the lease Ida Dixon reserved the right to sell the premises; that is to say, to convey the premises and the possession thereof, free and discharged from the lease, after the January following such conveyance. Unless she so sold and conveyed, the note, by its terms, was never to become due, but was "to be void and of no value." The $100 stipulated to be paid to the plaintiff by the lease and the note was for the manifest purpose of compensating him for the loss of the possession of the premises and the benefits of the lease in case of such sale and conveyance. Under such an agreement it would be anomalous to hold that the plaintiff was entitled to the $100 mentioned, and also to retain the possession of the premises and the full benefits of the lease for the full term of five years therein stipulated. And yet such is the result of the ruling of the trial court.

But, even with such a construction, still the demurrer *ore tenus* should have been sustained. The action was commenced within a year after the date of the note, whereas the note, by its terms, was not due until "on or before four years after date," with a proviso to the effect that it should only then "become due" in case of such sale of the farm. The words "on or before" undoubtedly gave to the makers of the note the privilege of paying at any time before the end of the four years, but they did not give the holder of the note the right to enforce collection before that time.

Thus, in the language of COOLEY, J., the note "is payable certainly and at all events on a day particularly named, and at that time, and not before, payment might be enforced against the maker. . . . True, the maker may pay sooner if he shall choose; but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more." *Mattison v. Marks*, 31 Mich. 423. See, also, *Jordan v. Tate*, 19 Ohio St. 586; *Wilson v. Bicknell*, 170 Mass. 259, and cases there cited.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

MCFARLAND, Appellant, vs. LINDEKUGEL, Respondent.

September 8 — October 12, 1900.

107 474
114 150

Streets: Easements: Plats: Estoppel: Injunction.

1. While the rule is general that, to charge a municipality with obligations arising from the use of dedicated streets, there must be an acceptance and opening or use equivalent thereto, a different rule prevails when the contest is between the owner of a plat, who has sold lots with reference thereto, and his grantee.
2. A grantor of defendant laid out an addition to an unincorporated village, and defendant sold plaintiff two lots thereof, all the conveyances after the plat, including that to plaintiff, being made by lots and blocks according to the plat. The streets of the plat were, by an order of the town board duly recorded, declared to be highways of the town, but after that time were never opened, traveled, or worked. After plaintiff's purchase defendant fenced up the street in front of plaintiff's lots. *Held* that, such street being appurtenant to plaintiff's lots, the owner of the plat and his successors in estate were estopped from claiming the street was not such; and that the maintenance of such fences was a direct invasion of plaintiff's rights, which, by reason of such estoppel, defendant could not be heard to justify.
3. In such case the fact that, after the commencement of the suit and before trial, the defendant removed the fence cannot affect the plaintiff's right to a judgment enjoining the maintenance of the fence, otherwise the defendant might again insist upon the right to replace and maintain it.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

This is an action in equity to cause the removal of fences maintained by the defendant across a street passing plaintiff's premises, and to perpetually enjoin their maintenance. The land is located in the unincorporated village of Maniwa, in the town of Little Wolf, Waupaca county. In 1876, William Evans, who was the owner thereof, laid out, platted, and recorded an addition consisting of four blocks, called Evans's addition to the village of Maniwa. It adjoined J. M. Rounds & Co.'s addition on the south, and the streets running north and south through the two additions correspond and bear the same name. Title to blocks 2 and 4 came to defendant in 1891. Factory street runs along the east margin of these two blocks. In 1896 defendant conveyed lots 5 and 6, block 4, to plaintiff. These lots comprise the northeast quarter of the block, and abut on Factory street. Block 2 is immediately north, being separated from the plaintiff's premises by Third street. Defendant's deed to plaintiff described the property conveyed as "lots 5 and 6 of block 4 of William Evans's addition to the village of Maniwa, in the town of Little Wolf." Plaintiff immediately entered into possession, and built a residence and barn thereon. Defendant has since maintained a fence across Factory street, at the south line of block 2, and another across the same street, near the north line. These fences constitute the alleged nuisances. The case was tried by the court, and findings made, among other things, that Factory street had never been opened or worked; that, by reason of the obstruction in the street, plaintiff's premises were less desirable for residence purposes, and less valuable by one or two hundred dollars; and that plaintiff's injury was not different in kind from that suffered by the public in general. The conclusions were that plaintiff was not entitled to relief; that Factory street opposite blocks 2 and 4 was not a

public highway when plaintiff purchased his lots; and that defendant was entitled to judgment. Due exceptions to the findings were filed, and from the judgment entered for defendant the plaintiff has appealed.

C. D. McFarland, appellant, in person.

For the respondent the cause was submitted on the brief of *Cate, Lamoreux & Park.*

BARDEEN, J. Defendant's deed describes the property conveyed to plaintiff as certain lots in a given block of "William Evans's addition to the village of Maniwa." At that date he was the owner of the two blocks of the addition which abutted on Factory street. The land was platted by Mr. Evans, the owner, in 1876, and, so far as the record discloses, all subsequent conveyances were made by lots and blocks according to the plat. In 1880 the town of Little Wolf, acting under the provisions of sec. 1224, R. S. 1878, made and recorded an order declaring the streets and alleys shown upon the Evans plat to be highways of the town. Factory street at that time had never been formally opened, and the court found that that portion which was obstructed by the defendant's fences "has never, since it was declared a highway by the town board, been opened, traveled, or worked." The theory upon which the case was tried and disposed of was that the street, never having been opened prior to plaintiff's purchase, never became a public highway, and therefore the plaintiff had no right to insist upon its being opened. It is possible that the court may have been misled by a statement contained in *Mahler v. Brumder*, 92 Wis. 477. It is there said: "The law is well settled that, to constitute a public street or highway by dedication, there must not only be an absolute dedication,— a setting apart and surrender to the public use of the land by the proprietors,— but there must be an acceptance and a formal opening thereof by the proper authorities, or a use equivalent to

such acceptance and opening." This is undoubtedly good law in a case where the contest is between an individual and the public authorities. The rule is general that, to charge a municipality with obligations arising from the use of dedicated streets, there must be an acceptance and opening or use equivalent thereto. But when the contest is between the owner of a plat who has sold lots with reference thereto and his grantee a different rule prevails. Thus, it was said in *Donohoo v. Murray*, 62 Wis. 100: "When land is so divided into lots, and a plat made, and the lots and streets marked thereon, and the owner sells a lot so designated on the plat, and for a consideration evidently affected by its situation as a lot on a public street, he is estopped from depriving the purchaser of the use of the street. He, at least, has an easement in such street to be enjoyed in connection with the lot, of which the grantor cannot deprive him, whether the public have an easement therein as a public highway or not." This rule is of universal application, as will be seen by reference to the following authorities: *Dobson v. Hohenadel*, 148 Pa. St. 367; *McLemore v. McNeley*, 56 Mo. App. 556; *Lord v. Atkins*, 138 N. Y. 184; *Wilson v. Acree*, 97 Tenn. 378; *Indianapolis v. Kingsbury*, 101 Ind. 200; *Wolfe v. Sullivan*, 133 Ind. 331; *Bartlett v. Bangor*, 67 Me. 460; *Bissell v. N. Y. C. R. Co.* 23 N. Y. 62; *Fox v. Union S. Refinery*, 109 Mass. 292; *Lennig v. Ocean City Asso.* 41 N. J. Eq. 606; *Baltimore v. Frick*, 82 Md. 77.

Some few of the cases put the right of the grantee upon the ground that there is an implied covenant to the use of the street, but the great majority, and with the better reason, base it upon the ground of estoppel *in pais*. See Herman, Estoppel, § 1147. Whether the public have ever accepted its use as a street or not cannot affect the matter as between grantor and grantee. *Bissell v. N. Y. C. R. Co.*, *supra; Bartlett v. Bangor*, 67 Me. 460. Some of the cases go to the extent of holding that this rule applies to *all* of the

streets shown on the plat. *Quicksall v. Philadelphia*, 177 Pa. St. 301. But in this case it is not deemed necessary to go to that extent. The case of *Mahler v. Brumder*, 92 Wis. 477, holds, in effect, that, in so far as the streets on the plat are appurtenant to the lot conveyed, the making and filing of the plat, and subsequent conveyances of lots with reference thereto, gives the grantee a right to the use of such streets. The logic of the decision is that, in so far as such streets and ways are appurtenant to the lot conveyed, the owner of the plat or his successor in estate is estopped from claiming that such streets and ways are not such. Factory street, as delineated on the map, passed plaintiff's premises, leading northward to a settled portion of Rounds's addition. It was clearly appurtenant and of value to the plaintiff's lots, as furnishing a direct means of communication with his neighbors. The maintenance of these fences across the street was a direct invasion of plaintiff's rights, and the defendant cannot be heard to justify it, because he is estopped by his deed. The plaintiff is not seeking to vindicate the rights of the public, but is enforcing an individual right, resulting from the acts of his grantors in platting the property and selling lots with reference thereto. In that view, the judgment of the court below was wrong.

A suggestion is made by defendant's counsel that after the suit was commenced, and before trial, defendant had sold lots in block 2, and had removed the fences. This cannot affect plaintiff's right to a judgment, as the defendant might again insist upon the right to replace and maintain the obstruction.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment for the plaintiff according to the prayer of his complaint.

FORD, Respondent, vs. SCHLIESSMAN, Appellant.

107 479
111 819

September 8 — October 12, 1900.

Trespass: Instructions to jury: Evidence: Possession of dwelling by wife in husband's absence: Damages.

1. In an action for unlawfully trespassing upon and entering the premises and dwelling house occupied by plaintiff, it appeared, among other things, that the house belonged to plaintiff's husband: that in the night time, during his absence, and without plaintiff's consent and against her protest, defendant entered the house through the back door and began fussing with his clothes; that defendant said nothing while in the house, but walked up to the bedroom door; that on plaintiff's ordering him out, he passed through the house and went out of the front door. *Held*, that plaintiff, being at the time in the exclusive possession of the dwelling house and premises as against the defendant, might recover such damages as she sustained by reason of such invasion of her possession and rights, even though the evidence was insufficient to show any direct assault upon the plaintiff, or any attempt to have carnal intercourse with her.
2. The plaintiff in such case is not entitled to recover any damages to the premises, that being a matter between the owner of the house and the defendant.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

For the appellant there was a brief by *W. S. Stroud* and *Daniel H. Grady*, and oral argument by *Mr. Grady.*

J. H. Rogers, for the respondent.

CASSODAY, C. J. This action was commenced December 8, 1896, to recover damages for unlawfully trespassing upon and entering the premises and dwelling house occupied by the plaintiff and her four children late on the evening of May 9, 1896, and making indecent demonstrations towards the plaintiff, and thereby intentionally putting her in great fear and frightening her, and causing her great pain, suffering, mental anguish, humiliation, and mortification. The

complaint also alleges that the defendant was at the plaintiff's house each of the two previous evenings, and on one of those evenings procured of the plaintiff a match with which to light his pipe. The answer admits being at the plaintiff's house on the night in question, and also being there and getting a match prior to that night, but otherwise denies each and every allegation of the complaint. At the close of the last trial the jury returned a verdict in favor of the plaintiff, and assessed her damages at $400. From the judgment entered thereon for that amount and taxable costs, the defendant brings this appeal.

It appears that the plaintiff lived in the southwestern portion of the village of Rio, and the defendant kept a hotel in the eastern portion of the village, about eighty rods distant. They were unacquainted until the night before the transaction complained of. Between 8 and 9 o'clock of that first evening the defendant was at the plaintiff's house, and called her by name, and introduced himself, and asked her for a match to light his pipe; and after lighting it he sat in the house for two or three minutes, and then left, about the time the plaintiff's sister came in.

The defendant testified to the effect that he had been unwell, and his physician had advised him to walk for exercise; that some time after 8 o'clock of the next night (Saturday) after getting the match, he started out to take the same walk as the night before; that the plaintiff's house was near the end of the walk; that from necessity he went into the water-closet on the plaintiff's premises; that when he came out he saw a little boy right there in the shanty, and spoke to him, and said, "Good evening, Bub," as he wished to show himself to be a man, and not a tramp; that the first he heard or saw of the plaintiff that evening was when Mr. Spaulding and Mr. Graves came out; that he was then in the shanty, and she was in the room in the other side of the house, and she said "Get out here, get out here," and that

he then went right through the house, without saying or doing anything to her or attempting to go into the bedroom; that he did not remain in the house for any space of time, but went right through the house and out the front door, and there found Mr. Spaulding and Mr. Graves, who took hold of him, and he told them to keep away from him, as he had done nothing wrong, and did not calculate to. On cross-examination he further testified to the effect that he remained just outside the kitchen — only a step or two from the kitchen — some minutes; that while he was there Mr. Spaulding and Mr. Graves came there to the door and asked him what he had to do there, and he said he did no harm; and that he did not hear them make any noise, except that.

Mr. Spaulding and Mr. Graves both testified to the effect that they lived near the plaintiff; that about 10 o'clock of the night in question they were told that the defendant was at the plaintiff's house; that they at once went there, and went around to the back side of the house, to the east kitchen door; that the inside door was open, but that there was a screen door that was shut; that they saw no one in the back room; that thereupon one of them took a stick of wood and rapped on the side of the shanty, and told the defendant to get out, that just at that time some one "hollered" that the defendant was going out the front way; and that they thereupon went around to the front door, and met the defendant there. The plaintiff testified to the effect that, the first she saw of the defendant on the night in question, he was at the back door of her kitchen, when she went out to close it to go to bed; that she then saw he was coming right up to the door,— had his hand on the door, coming into the house; that when he heard her he asked if he could come in; that she answered, "No, sir;" that he came right in, and "began fussing with his clothes;" that it frightened her, and she ran out of the front door and met Mrs. Graves and Millie Spaulding; that they called Mr. Spaulding and

Mr. Graves, and they came and went around to the back side of the house, as she supposed; that during that time the defendant had been in the kitchen,— long enough for the men to come over and get around to the back door; that the defendant then came into the house and went into the bedroom door; that she then told him to come back and go out; that he then passed through the house and went out the front door, and the men took him away; that the defendant did not say anything while in the house; that he had no chance to say anything, as she ran through to the front door; that all four of her children were in bed, but the oldest boy was not asleep yet; that such conduct of the defendant frightened her badly, and the effects of the fright continued for several weeks, so that she could not sleep nights; that her husband was in Madison at the time, and had been for about six weeks; that the night the defendant got the match he said nothing out of the way to her; that she did not know but he was drunk, or something of that kind; that the door from the kitchen into the upright part of the house was quite close to the door entering the kitchen from the outside,— only a step between them; that after she ran from the kitchen to the front door, as stated, the defendant went back into the kitchen, and remained there until after Mrs. Graves and Millie Spaulding came, and the men came; that he did not come into the upright part of the house until after the men came, and that she did not order him out until after he came into the upright part of the house; that as the defendant went through the house he did not say a word to the plaintiff,— he had no chance, as there was company present; that when he came in, and before she ran to the front door, "he began fussing with his clothes,— fussing with his pants."

The important question in this case is whether the evidence thus summarized is sufficient to support the verdict rendered. The plaintiff, having obtained a verdict, is of

course entitled to as favorable a construction of such evidence as it will legitimately bear. Still we are not to lose sight of the nature of the action, and the principles of law applicable.

The court properly charged the jury to the effect that there was no question in this case as to any damage to the premises,— the house and lot,— and that they had nothing to consider in that respect; that that was a matter between the owner of the house and lot and the defendant, so they could not give any damages upon that ground in this case.

There is no pretense that the defendant ever touched the plaintiff, or that there was any physical contact between them. The defendant contends that the plaintiff cannot recover damages for mere fright and mental disturbance, and that the evidence shows nothing more. It seems to be well settled that damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot be considered a consequence which in the ordinary course of things would flow from mere negligence. *Victorian R. Comm'rs v. Coultas*, 13 App. Cas. 225; *Spade v. L. & B. R. Co.* 168 Mass. 285; *S. C.* 172 Mass. 488; *Smith v. Postal T. C. Co.* 174 Mass. 576; *Mitchell v. Rochester R. Co.* 151 N. Y. 107. The same rule has been applied by this court to an action for damages for mental distress alone, caused by negligent delay in delivering a telegram. *Summerfield v. W. U. Tel. Co.* 87 Wis. 1. It was there properly said by my brother WINSLOW, in respect to cases relied upon as holding a contrary rule, "that there was in all of them the element of injury or discomfort to the person resulting either from actual or threatened force." *Id.* p. 12. Several exceptions to such rule were mentioned in that case. None of the exceptions pointed out in that case was present in the more recent case of *Gatzow v. Buening*, 106 Wis. 19, 20, where the opinion was written by my brother MARSHALL. It is said by a learned author that "it

was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental, namely, in cases of assault without physical contact." 1 Sedg. Meas. Dam. (8th ed.), § 43. The cases cited support the text. *I. De S. v. W De S.* Year Book, Lib. Ass. fol. 99, pl. 60; *S. C.* 1 Ames, Cases on Torts, 1; *Tombs v. Painter*, 13 East, 1; *Mortin v. Shoppee*, 3 Car. & P. 373; *Stephens v. Myers*, 4 Car. & P. 349; *Lewis v. Hoover*, 3 Blackf. 407; *Handy v. Johnson*, 5 Md. 450, 465; *Goddard v. G. T. R. Co.* 57 Me. 202; *Beach v. Hancock*, 27 N. H. 223; *Leach v. Leach*, 11 Tex. Civ. App. 699. As stated by TINDAL, C. J., in one of the cases cited: "It is not every threat, when there is no actual personal violence, that constitutes an assault. There must, in all cases, be the means of carrying the threat into effect." *Stephens v. Myers, supra.* The nature of such action has usually been trespass *vi et armis.* The theory upon which such actions have been sustained is the same as in actions of false imprisonment, where the plaintiff, without being touched by the defendant, has been allowed to recover substantial damages, though physically he suffered no actual detriment. 1 Sedg. Meas. Dam. (8th ed.), § 43, and cases there cited. A direct assault upon an individual, as well as such imprisonment, invades the personal liberty and rights of the individual assaulted, and hence comes within the exceptions mentioned in the *Summerfield Case, supra.*

One difficulty with the case at bar is that the evidence is insufficient to sustain a verdict that the defendant made any direct assault upon the plaintiff, or any attempt to have carnal intercourse with her. True, the time and manner of his coming were well calculated to excite suspicion as to his purpose in entering the house as he did. But verdicts must be based upon evidence, and not mere suspicion. The case was manifestly submitted to the jury, and punitory damages authorized, on the theory that the evidence was sufficient to

authorize the jury to find that the defendant entered the house and made a direct assault upon the plaintiff for the purpose of having carnal connection with her, whereas, in our judgment, the evidence is insufficient to support such verdict. In other words, there has, in our judgment, been a mistrial.

But it does not follow that the plaintiff can recover nothing. The plaintiff's husband was absent. During his absence she was the head of the family and in possession of the household. The defendant was a stranger, and had no right to go into the house without her consent. He not only went into the kitchen without her knowledge or consent, but against her protest. So he went through the house against her protest. True, the house belonged to the husband, but the possession for the time being was hers. Thus, in a case in Vermont: "The plaintiff gave lessons in music one day in each week to the defendant's daughters, and lodged at his house overnight. A private lodging room was assigned her by the defendant and his wife. On one occasion, at midnight, the defendant stealthily came into the room where the plaintiff was sleeping, sat down upon her bed, leaned over her person, and made repeated solicitations to her for sexual intimacy, which she repelled. *Held*, that the plaintiff's right to her private sleeping room during the night *was exclusive*, and that trespass *quare clausum* will lie against the defendant. Sitting on her bed, leaning over her person, etc., under the circumstances was an assault." *Newell v. Whitcher*, 53 Vt. 589. In that case there was a verdict for $225, of which $100 was for exemplary damages, and the same was sustained. But in that case there was a direct assault upon the plaintiff for the purpose of having carnal intercourse with her. In the case at bar we must hold that the plaintiff was at the time in the exclusive possession of the dwelling house and premises, as against the defendant; and, upon the evidence in the record, she has the right to recover such

damages as she has sustained by reason of such invasion of her possession and rights.

Other errors are assigned, but it is unnecessary to consider them, as they are not likely to arise upon a new trial.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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ROBERTS, Appellant, vs. VON BRIESEN, Respondent.

September 10 — October 12, 1900.

Surface water: Drains: Easements: Prescription.

1. In an action to restrain the obstructing or interfering with a ditch running across defendant's land, in and through which surface water from plaintiff's lots had been accustomed to flow for many years, and to compel the removal from such ditch of obstructions placed therein by defendant, the complaint alleged, among other things, that the ditch was from one to three feet deep and from three to five feet wide, and was dug fifty years before by plaintiff's grantor; that it had been used continuously, openly, notoriously, uninterruptedly, and *adversely to*, and with the knowledge and acquiescence of, the defendant and those under whom she claimed title, for such period; that such ditch had been used and enjoyed by the plaintiff personally in draining his premises continuously for thirty years; that for twenty-six years the city authorities had maintained substantial culverts over such ditch at points where it crossed principal streets of the city, and that defendant had placed obstructions in such ditch at points where it crossed her premises, thereby causing the surface water flowing therein to back up and overflow plaintiff's premises, to his damage. *Held*, that the complaint stated a good cause of action.
2. The owner of land may, by draining such land of surface and other water by an artificial way onto or through the land of another, openly, continuously, *adversely*, and with the consent of such other, for a period of twenty years, acquire an easement in the latter's land for a continuance of such drainage.

APPEAL from an order of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Paul D. Durant* and *E. E. Brossard*, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Jones & Stevens*, and oral argument by *E. Ray Stevens.*

CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to the complaint in an action to restrain the defendant from obstructing or interfering with a ditch on her land, in and through which water from the plaintiff's lots (described) had been accustomed to flow for many years, and to compel the defendant to remove from such ditch, sand, earth, and other obstructions which she had placed therein, and for damages.

The complaint alleges, in effect, that several of the streets in the city of Columbus run northeasterly and southwesterly, and that they are crossed by other streets at right angles, running northwesterly and southeasterly; that the plaintiff has for thirty years owned two lots in block 4, Newcomb's addition; that the next block to that on the northeast is block No. 3 of Newcomb's addition, and that the next block to that on the northeast is block No. 1 of Birdsey's addition, and that the defendant owns four lots in that addition; that most of the land embraced in those three blocks was, in its natural state, low, springy, wet, and marshy, and furnished drainage for the higher ground lying to the northwest and the southeast of it; that such low, wet, and marshy ground extended from the street next southwest of the plaintiff's lots to the Crawfish river, fifty rods northeast of the defendant's lots; that such low, wet, marshy tract had and has a gradual and easy slope and fall from the street next southwest of the plaintiff's lots in a northeasterly direction to the river; that in 1850 the owner of said blocks 3 and 4 in Newcomb's addition cut and dug a ditch and open drain across said blocks, and on or near the center line thereof, from the street next west of the plaint-

iff's lots to block 1 in Birdsey's addition, and that said ditch and open drain was cut and extended across the plaintiff's lots through and over two of the defendant's lots in that block, and on to the Crawfish river, and has ever since existed and been maintained; that such ditch is practically straight, and is from one to three feet deep and from three to five feet wide, and at all times since 1850 the ditch has afforded a ready passage and flow for water, and that during all of that time water has flowed through the ditch, with the exception therein mentioned and complained of; that the ditch was cut and dug, and has always been maintained and kept open and used, to drain said blocks 3 and 4 and the adjoining streets, and to carry off the surface water that came upon them, and the water that percolated through the soil; that in 1870, when the plaintiff went into possession of his premises, a dwelling house, with a cellar, stood thereon; that a drain or blind ditch then connected the bottom of the cellar with the ditch on the premises, and carried into the ditch all the water that found its way into the cellar, and completely drained the same, and made it dry and serviceable; that the dwelling, cellar, drain, and ditch had long existed and been maintained when the plaintiff went into possession in 1870, and have ever since been maintained, used, and enjoyed by the plaintiff; that the plaintiff has used the ditch, and the whole thereof, and particularly the portion thereof on and across the defendant's lots, continuously and without interruption, for thirty years, to drain his lots and the cellar to his dwelling thereon, and to carry off the surface water that fell or flowed upon his lots, and that his predecessors in ownership had so used and enjoyed such right across the defendant's lots for more than twenty years prior to the date when the plaintiff became the owner of the lots; that such use and enjoyment by the plaintiff, and those under whom he claims title, of such ditch, and the right of flowage of waters in the same across the defendant's prem-

ises during all of said time, and for fifty years, was continuous, uninterrupted, open, notorious, adverse to, and with the knowledge of, and acquiesced in by, the defendant and those under whom she claims title to her said premises, and that such use and enjoyment by the plaintiff personally has existed and continued thirty years; that the city since 1874, and the town previously, maintained substantial culverts and bridges over said ditch on three of the streets of the city, and from year to year exercised the right, without objection from the defendant or those under whom she claims title thereto, and with their acquiescence, of going onto said premises to clean said ditch and to remove obstructions therefrom, to the end that waters coming in the ditch from said blocks 3 and 4, and from the streets of the city, and from higher places, might have a free and uninterrupted flow through said ditch and over and across the defendant's premises to the Crawfish river; that during November, 1899, the defendant hauled and dumped large quantities of sand and earth in said ditch upon her premises, and filled the same, and completely plugged the lower and northeast opening of the culvert at the street line immediately southwest of her lots, and completely stopped the flow of water from the plaintiff's premises through said ditch onto the defendant's premises; that there was a heavy but not extraordinary fall of rain February 7, 1900; that the obstruction so placed in said ditch by the defendant stopped the flow of waters going off from the plaintiff's premises, and caused the waters to flow back upon the same, and thereby submerged the same with water, and caused the barn and the cellar of his residence to be flooded, and the cellar and residence, and contents therein, greatly injured and damaged, to the amount of $250; that the defendant has refused and still refuses to remove such obstructions to the ditch, and gives out that it is her intention to maintain such obstructions, and keep said ditch on her premises filled and obstructed.

It is said by counsel for the plaintiff that in deciding this case the trial court was controlled chiefly by the decision of this court in *O'Connor v. F. du L., A. & P. R. Co.* 52 Wis. 526, and counsel for the defendant seem to rely upon that case as almost identical with the case at bar. But the controlling facts in this case were not present in that case. No part of the ditch in that case touched Mrs. O'Connor's land. The ditch started on "low lands near her premises," and the surface waters on her premises did not reach the ditch until after they had passed for some distance from her lands. Besides, the question of the right to the use of the ditch by prescription, which is here prominent, was not there involved.

According to this complaint, the ditch in question was from one to three feet deep, and from three to five feet wide, and commenced southwest of the plaintiff's lots, and ran in a northeasterly direction across the plaintiff's lots, and from thence in the same direction across the defendant's lots, and on to the river; and the same was dug fifty years ago by the then owner of the plaintiff's lots, and the same had continued openly, notoriously, and uninterruptedly, and adversely to, and with the knowledge and acquiescence of, the defendant and those under whom she claims title, for fifty years; and the plaintiff personally had the use and enjoyment of such ditch in draining his premises continuously for thirty years; and ever since 1874 the city has maintained substantial culverts and bridges over such ditch in three of the principal streets of the city. The question presented is whether the defendant may now lawfully deprive the plaintiff of such use.

This court has from the first been in harmony with the principles of law adjudged in Massachusetts as to the diversion of surface water. *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, and cases there cited. It was held in Massachusetts, many years ago, that the right to the use of a ditch through the land of another for the drainage of surface water might

be established by adverse user. *White v. Chapin*, 12 Allen, 516, 519. In that case it is said in the opinion of the court that, "Wherever there has been the use of an easement for twenty years, unexplained, it will be presumed to be under a claim of right and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless controlled or explained; and it is incumbent upon the owner of the land to prove that the use of the easement was under some license, indulgence, or special contract inconsistent with a claim of right by the other party." And in a later case it is said in that state: "There is the well-settled distinction that although a man may make any fit use of his own land which he deems best, and will not be responsible for any damages caused by the natural flow of the surface water incident thereto, yet he has not the right to collect the surface water on his own land into a ditch, culvert, or other artificial channel, and discharge it upon the lower land, to its injury. And if he does this, and continues it adversely and under a claim of right for more than twenty years, he thereby acquires a right which is in the nature of a servitude or easement upon the lower land." *Rathke v. Gardner*, 134 Mass. 16. Mr. Gould states the common-law rule and the civil-law rule thus: "The owner of land, by collecting into artificial channels the surface water or superficial drainage there flowing, and discharging such accumulations upon or across the land of an adjoining owner *adversely* for a sufficient length of time, may acquire an easement in such adjacent land for the continuance of such discharge; and under the *civil law* prescriptive rights may be gained in surface drainage as well as in water courses." Gould, Waters (2d ed.), § 279. Such distinction was strictly observed by this court in a recent case where my brother MARSHALL, speaking for the court, said: "Such facts constitute all the elements of a prescriptive right, and do not come within the rule which prevails ordinarily, that one cannot acquire

a right by prescription to have mere surface water flow naturally over the surface of his land onto and across the land of another, but within the other rule, that the owner of land may, by draining such land of surface and other water by an artificial waterway onto or through the land of another, openly, continuously, *adversely*, and with the consent of such other, for a period of twenty years, acquire an easement in the latter's land for a continuance of such drainage." *Wilkins v. Nicolai*, 99 Wis. 181. This case is so clearly ruled by that case as not to necessitate further discussion. The same principle had previously been applied by this court to the acquisition of a right of way by twenty years' adverse user. *Carmody v. Mulrooney*, 87 Wis. 552. The authorities cited and relied upon by counsel for the defendant upon the subject of parol license to occupy land, and the revocation of such license (*Thoemke v. Fiedler*, 91 Wis. 386, and cases there cited), have no application to the facts alleged in this case.

We must hold that the complaint states a good cause of action.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with direction to overrule the demurrer and for further proceedings according to law.

LINDEN LAND COMPANY and another, Respondents, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, imp., Appellant.

September 11 — October 12, 1900.

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112	[11] 21
107	493
113	[5] 356
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115	154
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(1) *Appeal: Intermediate orders, when reviewed.* (2) *Denial of leave to discontinue action: Jurisdiction.* (3–14) *Taxpayer's action: Street railroads: Franchises: Discretion of common council: Parties: Pleadings: Surplusage: Injunction: Motion to vacate: Abutters: Compensation: Constitutional law: Statutes: Reasonableness of extension of franchise: Review of ordinance granting franchises at suit of private parties.*

1. There is no provision of statute which authorizes a review of one intermediate order upon an appeal from another. Sec. 3070, Stats. 1898, provides for review of intermediate orders involving and necessarily affecting the judgment, on appeal from the judgment.
2. The circuit court has jurisdiction to refuse to allow a plaintiff to arbitrarily discontinue his action, and also jurisdiction to allow another plaintiff to be substituted in his place. *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226, followed.
3. A taxpayer cannot maintain an action to revise, control, or vacate the acts of a municipal government, except as incidental or subsidiary to the protection of some private right or prevention of some private wrong, or to prevent any wrongful squandering or surrender of the moneys, property, or property rights of the municipality, or when unlawful increase in the burdens of taxation is threatened by the proposed action.
4. By sec. 1862, Stats. 1898 (providing for the formation, etc., of street railway corporations), the city is empowered to grant the use of streets and bridges to such corporations *upon such terms as the proper authorities shall determine.* A city, acting under such statute, granted the defendant street railway company a franchise to extend its lines, then in operation, on certain designated streets, without receiving any money consideration therefor, but in consideration that the company should charge a reduced fare. The company had formerly offered a large sum of money for such franchise, with the right to charge the former fare; and other parties had offered a large sum of money for the additional franchise, but they owned no connecting lines. *Held*, that the granting of the franchise was a question addressed to the sound discretion of the common council; and that when it decided that the reduced fares

were more desirable for the public, while it may or may not have exercised good discretion, such action cannot be called, in any proper or reasonable sense, a squandering of public funds or property.

5. Under sec. 2604, Stats. 1898, authorizing one to sue for the benefit of all where the question is one "of common or general interest of many persons," two or more owners in severalty of abutting lots similarly situated *may* join as plaintiffs, in an action to prevent the laying of a street railway, about to be laid upon a street without authority of law, on the ground that it will be a continuing nuisance to the owners of abutting lots, but one cannot sue for the benefit of all; and a statement in the complaint that he does so sue is mere surplusage.

6. A motion to vacate a preliminary injunction is properly denied, where it appears from the complaint and the papers used upon such motion, that either or any of the plaintiffs was legally entitled to have the injunctional order maintained pending the action.

7. The true object of a preliminary injunctional order, both at common law and under the statute (sec. 2774, Stats. 1898), is to prevent the commission of some act, "the commission or continuance of which during the litigation would produce injury to the plaintiff." The extent of the necessity marks the extent of the right to enjoin.

8. The owner of property abutting on a street in which it is proposed to construct a street railway under a franchise, conditioned that it should be accepted by the railway company, even though he might be entitled to enjoin the construction of the railway in front of his lot, cannot enjoin the company from accepting the franchise, and thus in effect annul the entire grant.

9. In such case the owner of property abutting on one street cannot enjoin the construction of such street railway on another, a mile and a half distant, and on which he owns no property.

10. The laying and operation of an electric street railway for the carriage of passengers only, to be operated by the overhead system with trolley wires and supporting poles, under an ordinance permitting the same to be done, in the absence of a showing that it is proposed to locate poles or structures in such manner as to interfere with a property owner's right of access to his property, can be done without making compensation to the adjoining lot owners, and is not an additional burden to the fee. *La Crosse City R. Co. v. Higbee, ante*, p. 389, followed.

11. Sec. 1862, Stats. 1898, authorizing the formation of street railway corporations, and the granting to them, by municipal corporations, of the use of streets for the carriage of *freight* and passengers, is

not unconstitutional, in that it makes such railway a commercial railway and nowhere provides for the payment of compensation to the abutting owner: the statute is intended to authorize corporations to use streets, with the consent of the city, for carriage of freight *as against the rights* of the public only, not as against private owners, who are left in full possession of their rights to stop the construction, insist on compensation, or give their consent, as they chose.

12. While franchises permitting street railway corporations to use and occupy city streets are legislative grants, in that in granting them the common council is exercising legislative power delegated to it by the state, they are not grants of "corporate powers or privileges" within sec. 31, art. IV, Const., prohibiting the enacting of any special or private law granting corporate powers or privileges. They are not franchises essential to corporate existence, and granted as part of the organic act of incorporation, but are such as may be sold and assigned, if assignable, or lost by forfeiture, and yet not thereby affect the corporate existence of the street railway.

13. Under sec. 1862, Stats. 1898, giving the municipality power to grant to street railway companies the use of streets, without limitation, save that such grant be made "upon such terms as the proper authorities shall determine," the common council thereof has power to extend existing franchises of such corporations, which would expire in 1924 and succeeding years, to 1934, and such extension of time is not unreasonable.

14. Objection to the regularity of the proceedings of the common council in adopting an ordinance granting to a street railway corporation the streets of the city, in that the provisions of sec. 940*b*, Stats. 1898, requiring publication of the application therefor in the official paper for not less than two weeks, reference to appropriate committees, and report therefrom before action, were not complied with; and objection to such ordinance in that its officers used corrupt methods in securing passage of such ordinance by agreeing to pay large sums to citizens in order to induce them to cease opposition to its passage,—it not being charged that any member of the council was corrupted,—cannot be raised at the suit of private parties.

APPEAL from orders of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

On the 2d of January, 1900, the common council of the city of Milwaukee passed an ordinance and a resolution in

identical terms, each of which purported to grant to the defendant railway company the right to operate street railways upon certain streets in said city, and also purported to renew and extend all the existing railway franchises already owned by the railway company upon other streets in said city, and requiring said defendant railway company to file a written acceptance of the grants so made within thirty days. On the 5th of January, 1900, one J. G. Trentlage commenced this action in equity against the railway company and the city for the purpose of restraining the railway company from filing its acceptance of said grants, and restraining the city officers from receiving such acceptance, and preventing the railway company from laying street railway tracks and operating a street railway upon First avenue, in said city; the same being one of the streets covered by the grant.

The complaint alleged, in substance, that Trentlage was a citizen and taxpayer of the city of Milwaukee, and owned two lots on said First avenue, and brought the action in his own behalf and in behalf of all other taxpayers and owners of property in said city similarly situated, being many thousands in number; that the defendant railway company was a corporation authorized by its charter to carry freight and passengers by any kind of power as a common carrier, and owned, or claimed to own, certain licenses or rights under ordinances of the city to use a large part of the streets of the city for street railway purposes for limited periods of time, which had not yet expired, and which streets did not include First avenue and a number of streets specifically named. The complaint then proceeded to allege certain facts which constituted the grants attempted to be made by the ordinance and resolution of January 2d illegal and void. These allegations were, in substance, to the following effect: That a scheme or plan had been entered into by the mayor and certain members of the common council with the offi-

cers of the defendant railway company to extend the existing franchises of the company, and fix the rates of compensation to be charged by the company, and also to grant the right to use all the principal streets of the city for street railway purposes, for the purpose of preventing the common council of the city in the future from regulating rates of fare, or taking any action in respect to the granting of new franchises or the extension of existing franchises, and the fixing of the rate of fare for the carriage of passengers; that said franchises and privileges were of great value, and that large amounts of money had been offered for them, but that the same had been improvidently given away by the city, by virtue of said ordinance and resolution, without any remuneration, and that the city had no right or power to grant the same without consideration; that the money which the city might and could obtain for the franchise was thereby lost to the city, and that the city's expenses in the care and widening of the streets and viaducts thereby granted would be greatly increased, and the burdens of the taxpayers in said city correspondingly increased; that the defendant company proposed to operate its cars by the overhead electric system, and erect poles and wires in the streets, carrying both freight and passengers, and that no provision had been made for compensation to the plaintiff and other abutting owners, and that the defendant company threatened and intended to enter upon First avenue and upon the plaintiff's premises without compensation, and operate its railway upon said street; that the defendant railway company has already issued a mortgage and bonds upon all its acquired franchises, including those mentioned in this action, and intends to still further issue bonds thereon which will become a lien thereon in the hands of innocent purchasers; and that the plaintiff and other taxpayers will be remediless.

The complaint also alleges that there were illegal and im-

proper means employed by the officers of the railroad company to secure said grant, in that the said officers agreed to pay about $8,000 to various citizens for the purpose of silencing their opposition to said ordinance; that the ordinance in question was invalid, because not referred to a committee before action thereon by the common council, and because the action of the common council was not preceded by the report of a committee thereon, as required by the city charter; that said ordinance was invalid because no notice of the application for the grant had been published as required by sec. 940*b*, Stats. 1898. It was also alleged that the plaintiff had no adequate remedy at law.

Upon these allegations the plaintiff prayed that the defendant railway company be enjoined from accepting said ordinance and resolution, and that the grant of the common council be set aside and annulled, as a cloud on the plaintiff's title, and that the plaintiff have such other order or judgment as might be equitable.

Upon this complaint a preliminary injunctional order was obtained, enjoining the company from accepting said grant, and the officers of the city from receiving any acceptance thereof, and also enjoining the company from building its railway on any part of First avenue.

Immediately upon the service of the complaint and injunctional order, the defendant company moved upon the complaint to vacate the injunctional order, which motion was denied on the 29th of January, 1900. Upon the same day the plaintiff Trentlage came into court and filed a notice of discontinuance of the action, and attempted to move the court to dismiss the action; but said motion was not passed upon until the following day, when the *Linden Land Company*, a corporation which owns certain real estate fronting upon Locust street, one and one-half miles distant from Trentlage's lots upon First avenue, came into court and made a petition asking to be substituted as plaintiff in the

action, whereupon the court refused to dismiss the action, but allowed Trentlage to withdraw as plaintiff, and substituted the *Linden Land Company* in his place as plaintiff, and allowed the new plaintiff time in which to frame and file a new complaint. On the 29th of March, 1900, the substituted plaintiff filed a new complaint, and upon the 6th of April following one *Charles J. Eigel*, who owns a lot upon First avenue some distance from Trentlage's property, made petition to the court, asking to be joined as plaintiff with the *Linden Land Company*, which petition was granted April 7, 1900, against the defendant's objection.

The amended complaint of the *Linden Land Company* alleged its ownership of lots abutting on Locust street, one of the streets mentioned in the grant, and also alleged that it was a taxpayer, and maintained this action in behalf of all taxpayers and abutting owners similarly situated. It charges that the defendant railway company is an ordinary commercial railway, carrying passengers and freight. It set forth with particularity the previous grants of said railway franchises which had been made to different corporations, and which had been purchased by the defendant railway company, and had not yet expired. It then charged substantially the same illegalities in the ordinance attacked which were charged in Trentlage's complaint,— going, however, more into details; and the prayer for judgment contains a specific demand that the defendant be enjoined from entering on any part of the premises of the plaintiff, or other taxpayers and abutting owners in whose behalf the suit is brought. After the service of this complaint, the defendant railway company answered, putting in issue most of the allegations of the complaint.

Upon this answer and certain affidavits the defendant made a second motion to dissolve the injunctional order, which was heard and denied on the 9th day of June, 1900. From the order of January 29th refusing to vacate the preliminary

injunctional order, and from the order of June 9th to the same effect, the defendant railway company appeals.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, attorneys, and a separate brief by *Charles Quarles*, of counsel, and oral argument by *Mr. George P. Miller* and *Mr. Quarles*.

For the respondents there was a brief by *Timlin, Glicksman & Conway* and *Toohey & Gilmore*, and oral argument by *W. H. Timlin* and *John Toohey*. They contended, *inter alia*, that the ordinance in question was unconstitutional. *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 572; *State ex rel. Att'y Gen. v. Dayton T. Co.* 7 Ohio Legal News, 218; *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645; *Shepardson v. M. & B. R. Co.* 6 Wis. 605; *Newell v. Smith*, 15 Wis. 101; *Bigelow v. W. W. R. Co.* 27 Wis. 486; *Chicago & N. W. R. Co. v. O., A. & B. W. R. Co., ante*, p. 192; *Connecticut River R. Co. v. Comm'rs of Franklin*, 127 Mass. 50; *Neponset M. Co. v. Tileston*, 133 Mass. 189; *State v. Perth Amboy*, 52 N. J. Law, 132; *State v. C., M. & St. P. R. Co.* 36 Minn. 402; *Brewer v. Bowman*, 9 Ga. 37; *Foster v. Stafford Nat. Bank*, 57 Vt. 128; *Bloodgood v. M. & H. R. R. Co.* 18 Wend. 9; *People ex rel. Harvey v. Loew*, 102 N. Y. 471; *Williams v. N. Y. C. R. Co.* 16 N. Y. 97; Cooley, Const. Lim. (5th ed.), 693, 679 note 2, 705; Randolph, Eminent Domain, § 229. Said ordinance and sec. 1862, Stats. 1898, were unconstitutional under sec. 1, art. II, and secs. 31, 32, art. IV, Const. Morawetz, Priv. Corp. (2d ed.), § 12; *Stevens Point B. Co. v. Reilly*, 44 Wis. 295; 4 Thomp. Corp. § 5342; *Adams v. Beloit*, 105 Wis. 363; *Pennsylvania R. R. v. Montgomery Co. Pass. Ry.* 167 Pa. St. 62; *Sims v. Street R. Co.* 37 Ohio St. 556; *Chicago C. R. Co. v. People ex rel. Story*, 73 Ill. 547; *Belleville v. Citizens' H. R. Co.* 152 Ill. 171; *School Dist. v. Ins. Co.* 103 U. S. 707; *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612; *State ex rel. Cream City R. Co. v. Hilbert*, 72 Wis. 184; *State ex rel. Milwaukee St. R. Co. v.*

Anderson, 90 Wis. 550; *State ex rel. Church Mut. Ins. Co. v. Cheek*, 77 Wis. 284; *Black River Imp. Co. v. Holway*, 87 Wis. 584; *Central T. Co. v. Citizens' St. R. Co.* 80 Fed. Rep. 218; *S. C.* 82 Fed. Rep. 1; *Low v. Marysville*, 5 Cal. 214; *California S. T. Co. v. Alta T. Co.* 22 Cal. 398; *San Francisco v. Spring Valley Water Works*, 48 Cal. 493; *Waterloo T. R. Co. v. Cole*, 51 Cal. 381; *Omnibus R. Co. v. Baldwin*, 57 Cal. 160; *People v. C. P. R. Co.* 83 Cal. 393; *Spring Valley Water Works v. Schottler*, 62 Cal. 105; *Ex parte Pritz*, 9 Iowa, 30; *Hetherington v. Bissell*, 10 Iowa, 145; *Baker & Griffin v. Steamboat Milwaukee*, 14 Iowa, 214; *McGregor v. Baylies*, 19 Iowa, 43; *Stange v. Dubuque*, 62 Iowa, 303; *Denver & S. R. Co. v. Denver City R. Co.* 2 Colo. 673; *Atkinson v. M. & C. R. Co.* 15 Ohio St. 21; *State ex rel. Att'y Gen. v. Cincinnati*, 20 Ohio St. 18; *Pennsylvania & O. C. Co. v. Comm'rs of Portage Co.* 27 Ohio St. 14; *Ames v. L. S. & M. R. Co.* 21 Minn. 241; *Green v. Knife Falls B. Corp.* 35 Minn. 155; *State ex rel. Comm'rs v. Cooley*, 56 Minn. 540; *Alexander v. Duluth*, 57 Minn. 47; *State ex rel. Childs v. Copeland*, 66 Minn. 315; *State ex rel. Green v. Lawrence B. Co.* 22 Kan. 438; *Topeka v. Gillett*, 32 Kan. 431; *Little Rock v. Parish*, 36 Ark. 166; *Clegg v. School Dist.* 8 Neb. 178; 4 Thomp. Corp. § 5342; 1 Dillon, Mun. Corp. (4th ed.), § 6, and cases in notes; 1 Morawetz, Priv. Corp. (2d ed.), §§ 10–18, and case cited in notes; 32 Am. Law Reg. 613, 721, 816, 922, 1019, 1109.

WINSLOW, J. With the somewhat novel practice followed in this case, by which a new plaintiff owning property on a distant street was allowed to be substituted for the original plaintiff, and the original injunctional order was permitted to remain in force practically without complaint for weeks, while the new plaintiff was preparing his complaint, we are not concerned. No questions as to the propriety or regularity of these proceedings is before us, because the present

appeals are simply appeals from orders refusing to vacate the preliminary injunctional order. Upon appeal from a judgment, intermediate orders involving the merits and necessarily affecting the judgment may be reviewed. Stats. 1898, sec. 3070. But we know of no provision which authorizes a review of one order upon an appeal from another. *Breed v. Ketchum*, 51 Wis. 164. That the court had jurisdiction to refuse to allow the plaintiff to arbitrarily discontinue the case, and also jurisdiction to allow another plaintiff to be substituted in his place, was decided by this court in this very case. *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226.

So the case reaches this court upon the appeal from the order of June 9th in the same condition as it was in the trial court. The substitution of the *Linden Land Company* as plaintiff in place of the original plaintiff, and the addition of *Charles J. Eigel* as a plaintiff, are accomplished facts, not open to question or review; and we are to consider and decide whether, under the pleadings and affidavits before the court, they or either of them were entitled to the injunctional order originally granted. The case presented, then, is one in which two citizens, claiming to represent many thousand similarly situated, have come into court and challenged the validity of franchises granted by the city council, and demanded judgment that the grantee of the franchises be forbidden to accept or utilize them,—a judgment which, if granted, practically vacates and annuls the franchises as effectually as if they were vacated at the suit of the state. It is familiar law that courts do not revise, control, or vacate the acts of a municipal government at the suit of private persons, except as incidental or subsidiary to the protection of some private right or prevention of some private wrong. *Pedrick v. Ripon*, 73 Wis. 622; *Nast v. Eden*, 89 Wis. 610. The private person so suing must show something more than a mere speculative or theoretical

wrong or illegal act. He must show an actual or threatened invasion or destruction of a distinct right belonging to himself or to the body of citizens for whom he sues. He cannot sue to prevent an act merely because it is illegal. Any other rule would render the transaction of municipal business well-nigh impossible.

The present action must be tested by this rule. The claim of the plaintiffs is practically that they do come within the rule, because they allege that they are taxpayers of the city and also abutting owners upon streets covered by the franchise; and it is very evident that the action, if sustainable at all, must be on the ground that their rights either as taxpayers or as abutting owners, or both, are threatened with illegal invasion.

The claim that this is a proper taxpayers' action will first be considered. No court has been more liberal in maintaining the right of a taxpayer to vindicate the rights of himself and his fellow taxpayers against the actual or threatened malfeasance or nonfeasance of public officers than this court. The cases are numerous, and many of them recent. Such actions may be brought where municipal authorities are about to unlawfully dispose of public property or pay out public funds, or about to enter into unlawful and unauthorized contracts which will require public funds to discharge them, thus increasing the burdens of taxation, or squandering the property of the taxpayers, or both. *Webster v. Douglas Co.* 102 Wis. 181, and cases cited; *Rice v. Milwaukee*, 100 Wis. 516. And in a proper case the court will go further, and compel the unfaithful officers, and even third persons, to repay into the treasury sums already illegally paid out. These cases go on the principle that the money or property so squandered or about to be squandered is the money of the taxpayers, and hence every taxpayer has a substantial interest in it, which he is entitled to have protected. Upon similar principles a taxpayer's right to enforce

a cause of action of the corporation is upheld where the corporate officials wrongfully refuse or neglect to perform that duty. *Estate of Cole: Mulberger v. Beurhaus*, 102 Wis. 1. Here the basis of the right is not that there is necessarily a personal and direct pecuniary loss to the taxpayer, but that the public moneys, rights, or property are about to be squandered or surrendered, and that such moneys, rights, or property belong to the body of taxpayers, and are simply held in trust by the unfaithful public officials. This is well illustrated in the case of *Estate of Cole*, just cited, where real and personal property was willed in remainder to a city in trust for the establishment of a public library and a home for the aged poor, and a controversy arose between the executors and the city, in the county court, as to whether certain expenditures upon the property should be charged against the life tenant of the property, or against the *corpus* of the estate. The county court decided against the city, and, the city officials declining to appeal, a taxpayer intervened and took the appeal to the circuit court; and his right to do so was sustained by this court. Here no taxpayer could be said, in strictness, to have suffered a direct or pecuniary injury by the decision of the county court, or the failure to appeal therefrom; but the illegal diminution of the trust property was a distinct invasion of the property of the corporation, in which each individual taxpayer or member of the corporation had a substantial interest, notwithstanding the property could only be used for the purposes of the trust and its entire loss would not necessarily result in increased taxation. So understood, the case is in entire harmony with the general principles laid down in the other cases in this court.

Further than this it is not believed that any case has gone in this court, nor is it believed that any further extension of the rule is expedient or necessary. So the question is whether it is shown in this case that any wrongful squan-

dering or surrender of the moneys, property, or property rights of the city, or unlawful increase in the burdens of taxation, is threatened by the proposed ordinance, within the rules above stated.

It is claimed that such a squandering of valuable property is shown, because it is alleged that before the passage of the ordinance the city was offered $100,000 by a third party for the additional franchises granted to the defendant railway company by the ordinance, and also because it appears that the defendant company itself in the year 1898 offered to pay the city annually on the 1st of January of each year large sums of money, beginning with $50,000, and increasing the sum each year by $10,000, until it reached $100,000 annually, in case said city would grant the right to charge five-cent fares until the year 1935. These offers were, however, rejected by the city, and the present ordinance adopted, by the terms of which no moneys are to be paid to the city, but the company is required to sell twenty-five tickets for $1, good for travel during certain morning and evening hours, until January 1, 1905, and after that time good during all hours of the day.

It seems very plain to us that this action of the council cannot be called, in any proper or reasonable sense, a squandering of public funds or property. By sec. 1862, Stats. 1898, the city is empowered to grant the use of streets and bridges to street railway corporations *upon such terms as the proper authorities shall determine.* Here is a broad grant of discretionary powers. The question before the council was, What terms shall be attached to the grant? Is it more beneficial to the public to secure a cash payment, or payments which will benefit taxpayers only, or to secure lower rates of fare for the public generally, or to impose other conditions? After exercising this discretion, and deciding that the terms imposed should be a gradual reduction of fare, rather than payments of money into the treasury, it

cannot be said that any city fund has been squandered, lost, or misused. Whether the city should receive *any* fund was a question for the council, in its discretion, to decide. When it decided that there should be no fund, but that reduced fares or other limitations upon the grant were more desirable for the public, it may or may not have exercised good discretion, but it has dissipated no city fund or property. And so with regard to the proposal of the third person to pay $100,000 for the additional privileges granted to the defendant company. The additional privileges were over a few fragments of widely separated streets. If used by the defendant company in connection with its other lines, covering almost the entire city, with the system of transfers provided by the ordinance, they would probably complete a harmonious system; but, if attempted to be used by an independent company as separate lines, it seems probable that they would be far less useful to the public. It was undoubtedly a question addressed to the sound discretion of the council, whether the franchise should be sold to a third person who could only run fragmentary lines, or should be granted to a company which would be required to incorporate the fragments into its system, and thus furnish to the traveling public continuous trips under a transfer system from one part of the city to another for a single fare.

The same considerations evidently apply to a number of other allegations in the complaint, to the effect that the grant of the franchise will necessarily put the city to great expense in repaving, widening, and improving streets and viaducts, and will seriously injure the water system of the city, by electrolysis of the pipes, thus increasing the burdens of the taxpayer. The fact that some injurious effects to streets, or water pipes in the streets, are liable to result from the granting of the franchise, does not impair the power to grant it, but simply becomes an important consideration to be taken into account in the fixing of the terms which

shall accompany the grant. This question also becomes a question of discretion, which discretion is vested in the common council, and cannot be controlled by a taxpayer or any body of taxpayers. We have found no other allegations which can reasonably be claimed to state any substantial injuries to the plaintiffs as taxpayers, within the rules governing taxpayers' actions, and the conclusion necessarily follows that no cause of action is stated in the complaint in favor of the plaintiffs as taxpayers only.

But the question remains whether a cause of action is stated in favor of either plaintiff as an abutting owner of real estate. Before proceeding to consider this question upon the merits, it seems necessary to dispose of a preliminary question which was much argued, namely, whether one abutting owner can maintain such an action on behalf of all other abutting owners. It is very evident that in a proper taxpayer's action, challenging the illegal waste or squandering of corporate funds or property, the question is one "of common or general interest of many persons," thus bringing the case within sec. 2604, Stats. 1898, and allowing one to sue for the benefit of all, because the fund or property threatened is undivided, and the interests of the taxpayers therein inseparable. But it is equally evident that the same considerations in no way apply to the interests of abutting owners who own separate parcels of property. In this case the interest of each property owner is separate and distinct from that of every other property owner. One owner in severalty is in no way interested in the injury (if any) to his neighbor's lot. In fact, the owner of one lot may consider his property injured, and the owner of an adjoining lot may consider his lot benefited, by the proposed street railroad; and such may be, in fact, the case resulting from the different uses to which the two lots are or may be put.

It is true that it has been held by this court that in case

of a threatened nuisance, affecting several parcels of real estate alike, the several owners may join in an action to prevent the projected nuisance. This principle has been applied to the construction of a bridge without legal authority, which would be a nuisance to several riparian owners (*Barnes v. Racine*, 4 Wis. 454); to the unlawful incumbering of a park or public place with buildings which would constitute a nuisance to the owners of lots fronting upon it (*Pettibone v. Hamilton*, 40 Wis. 402); also, to the diversion of water in a river to the injury of several riparian owners (*Grand Rapids W. P. Co. v. Bensley*, 75 Wis. 399). But the effect of these decisions is not that one may sue for the benefit of all, but simply that all such parties similarly affected are *proper*, though not necessary, parties to an action. *Kaukauna W. P. Co. v. Green Bay & M. C. Co.* 75 Wis. 390. They may join in one action if they choose, but they are not compelled to; and it follows logically from this that, if they do not join, no one owner is bound by the result of another's separate action. The theory of the action, where one properly sues for all, is that the result is conclusive on all who are similarly situated and whom the plaintiff rightfully represents; and such must be the theory, or else the plaintiff does *not* represent all, and the statement that he does is not only false but absurd.

It is palpably evident that the principle cannot apply to abutters, because, as said before, they may join or not, as they choose. If one can rightfully refuse to join, his rights manifestly cannot be litigated or determined in the action, and hence he cannot be bound by the result, and by no legal fiction can it be said that he has been represented in the action. It is well settled that the owners of lots in severalty cannot join as plaintiffs to set aside an illegal tax upon their separate lots; nor can they sue on behalf of themselves and other taxpayers. *Barnes v. Beloit*, 19 Wis. 93; *Pier v. Fond du Lac Co.* 53 Wis. 421. The line which divides this last-

named class of cases from the class of cases holding that two or more property owners may join to prevent a nuisance affecting their several lots alike is perhaps somewhat difficult to draw, but in any event neither rule justifies the bringing of the present action by one abutter for the benefit of all. Treating a street railway about to be laid upon a street without authority of law as a continuing nuisance to the owners of abutting lots, the most that can be said, under the decisions in this state, is that two or more owners in severalty of abutting lots similarly affected *may* join as plaintiffs, but that one cannot sue for the benefit of all, and a statement that he does so sue is mere surplusage. Whether, as in the present case, an abutting owner upon one street may join with an abutting owner upon another street a mile or more distant, even though it is intended to connect the lines upon the two streets with lines already existing, may be a serious question, but it is one which we do not feel called upon to decide. We are not now considering the case upon demurrer for improper joinder, and it seems that if it appears by the complaint and the papers used upon the motion to vacate that either plaintiff was legally entitled to have the injunctional order maintained pending the action, then the motion to vacate was properly denied.

Proceeding, then, to consider the rights of the plaintiffs as abutting owners simply, and conceding that the pleadings and affidavits show the supposed franchise to be invalid, and hence that they were entitled to an injunction preventing the laying of the railway upon the particular street in front of their several lots, it is still impossible to see how they could properly demand that the railway company should be prevented from accepting the franchise, and thus in effect annulling the entire grant. Such relief was in no way necessary to the protection of any right which they had as abutters. Their lots and all rights therein were completely and fully protected from injury when the proposed railway was

debarred from entering upon the street upon which their property abuts. They needed nothing further. The only true object and purpose of a preliminary injunctional order, either at common law or under the statute, is to prevent the commission or continuance of some act, "the commission or continuance of which during the litigation would produce injury to the plaintiff." Stats. 1898, sec. 2774. The court may enjoin any threatened act during the litigation, when such act would produce injury to the plaintiff's rights, but it will go no further than necessary for that purpose. The extent of the necessity marks the extent of the right to enjoin. To go further, and enjoin other acts which, if done, do not affect the rights in litigation in any way, is simply an exercise of arbitrary power, which cannot be defended for a moment. So it seems to us certain that, so far as the preliminary injunctional order prevented the defendant railway company from accepting the franchise, it should have been vacated, because the acceptance could in no way affect the rights of either plaintiff.

Upon the same principle it results that the *Linden Land Company*, suing to protect its rights as an abutter on Locust street, had no standing in court to insist that the injunctional order restraining the laying of tracks on First avenue, a mile and a half distant, should stand *pendente lite*. The building of a track on First avenue could not injure its property nor affect its rights as to the building of a track on Locust street a particle. And thus the case is reduced to the simple question whether the plaintiff *Eigel*, as an abutting property owner on First avenue, is shown to be entitled to an injunction *pendente lite* preventing the building of the track and operation of street cars in front of his property on First avenue.

That an abutting lot owner may enjoin the laying of a railway track which is about to be laid without authority of law on the street in front of his premises cannot be doubted

for a moment. It is unnecessary to cite cases upon this proposition. In the present case it is claimed that the grant to the railway company is void and conveys no power to lay tracks, for several reasons, which will now be considered:

1. It is said that the laying and operation of an electric street railway, to be operated by the overhead system, with trolley wires and supporting poles, is an additional burden on the fee, and hence that it cannot be done without making compensation to the adjoining lot owners. This contention is ruled in the negative by the case of *La Crosse City R. Co. v. Higbee*, *ante*, p. 389, where the exact question was discussed and decided. The ordinance in the present case is essentially identical with the one involved in that case. It authorizes the carriage of passengers only, and, in the absence of a showing that it is proposed to locate poles or structures in such manner as to interfere with a property owner's right of access to his property, it must be held that the present case is ruled by the *La Crosse Case* upon this question.

2. It is claimed that sec. 1862, Stats. 1898, under which the defendant corporation is incorporated, is unconstitutional, because it attempts to authorize the formation of street railway corporations vested with the power to carry *freight* as well as passengers, thus making it a commercial railroad, and also authorizes municipal corporations to grant the use of streets to such railway companies for the carriage of *freight* and passengers, and nowhere provides for the payment of compensation to the abutting owners. It may be admitted, for the purposes of the case, that a railway authorized to carry freight as well as passengers becomes a commercial railroad instead of a street railroad, and that such a railroad, when laid in a street, becomes an additional burden on the fee, and cannot be laid without the consent of, or compensation made to, the adjoining property owners. *Chicago & N. W. R. Co. v. Milwaukee, R. & K. E. R. Co.*

95 Wis. 561. But this hardly meets the question. It is true that our statutes contain no provisions authorizing such companies to condemn private property in the streets of cities or villages, although such condemnation may be had outside of cities and villages. Stat. 1898, sec. 1863*a*.

It is not quite clear how this deficiency in the law affects the corporate character of the defendant corporation. It may render it impossible for it to lay or operate a track for the transportation of *freight* without actually purchasing the right from private owners to cross their lands, but the legislature certainly had power to authorize the formation of just such corporations; and if it neglected to provide the corporation, when formed, with a means essential to its successful operation, the result would seem to be a very unfortunate one for the corporation, and perhaps one fatal to its business success, but not fatal to its corporate character. If such a corporation attempted to condemn, it could be successfully defeated by the fact that it was given no such power; and, if it attempted to lay tracks without condemning, it would be stopped with the proposition that it was taking private property without compensation. Passing this question, however, there are other considerations which seem to us to answer the contention without serious difficulty. The law should be sustained if possible on any reasonable theory. Every intendment is in its favor. We think it may reasonably be said that this law was only intended to authorize corporations to use streets with the consent of the city for carriage of freight *as against the rights of the public* and not as against private owners, leaving such private owners in full possession of their rights to stop the construction, insist on compensation, or give their consent, as they chose. Such was substantially the construction placed upon the act authorizing telegraph companies to place their poles in streets in the case of *Krueger v. Wis. Tel. Co.* 106 Wis. 96. This construction seems to us to

be entirely reasonable. It deprives the property owner of no substantial right, and has the additional merit that it does not violently disturb the many valuable rights and property interests, both public and private, which doubtless have arisen, founded in good faith upon the validity of the legislation attacked.

Furthermore, it will be noticed that the corporation does not obtain its right to use any given street from the terms of its charter. It might exist for a century, and, if no municipality saw fit to grant it a franchise to use its streets, it could do no business. In the present case the city has not chosen to grant it any right to carry freight upon a single street. All the franchises which it owns by purchase, as well as the franchise now in question, simply confer the right to carry passengers only, or, in other words, to build and maintain a street railroad in the usual and ordinary sense of the term; and we do not see how it can for a moment claim the power to carry freight over its lines in the city of Milwaukee, or do anything more than maintain a street railroad for the carriage of passengers only. If it can only maintain and operate a street railroad, it is quite difficult to see how the plaintiffs can be injured in any way by the failure of the legislature to endow the corporation with power to condemn private property.

3. Another claim is that the ordinance is unconstitutional because it is in effect a special or private law "granting corporate powers or privileges," and so prohibited by sec. 31 of art. IV of the constitution. The argument is that the ordinance attempts to confer corporate powers and privileges; that it is a special act of legislation; that, in enacting it, the city council was simply exercising legislative power attempted to be delegated to it by the state, or, in other words, was *pro hac vice* the legislature; that under the constitutional provision above cited the legislature itself could pass no such law; and that the city council can possess no greater power

than the legislature. This is an important contention, and, if well founded, is fraught with serious results to many interests; for it cannot be doubted that the power supposed to be granted to municipal corporations to grant such privileges as are here in question has been very frequently used. But there is a radical difficulty with the first premise, which demolishes the entire argument. While such franchises as were here granted are legislative grants, they are not corporate powers or privileges, within the meaning of the constitution. When granted to a corporation, they become the property of the corporation, and so may be called franchises of the corporation; but they are not "franchises essential to corporate existence, and granted as part of the organic act of incorporation." *State ex rel. Att'y Gen. v. Portage City W. Co.*, *ante*, p. 441. Some confusion undoubtedly exists in the cases on this subject, and such franchises have been sometimes called "corporate franchises," as noted in the case last cited, but this does not affect the true character of the franchises. The distinction was pointed out by Chief Justice RYAN in the *Railroad Cases*, 35 Wis. 425; on page 560, speaking of this very clause of the constitution, where he said that the phrase "to grant corporate powers or privileges" is equivalent to the phrase "to grant corporate charters," and, further, "A franchise is not essentially corporate, and it is not the grant of a franchise which is prohibited, but of a corporate franchise; that is, as we understand it, franchise by act of incorporation." This construction was followed and approved in *Black River Imp. Co. v. Holway*, 87 Wis. 584, and, indeed, it seems, upon reflection, the only reasonable construction which can be placed on the constitutional provision. Such franchises as those before us may be sold and assigned, if assignable, or the corporation may be deprived of them by forfeiture, and yet the corporate existence will be in no way affected. This consideration effectually disposes of the argument on this point, and renders it un-

necessary to inquire whether there may not be other infirmities in the argument which are equally fatal to it.

4. Another claim made is that the council had no power to extend existing unexpired franchises long before their expiration, and that, even if it had such power, the ordinance is void because it is unreasonable. It may be noted in passing that neither of the plaintiffs owns any property abutting on any of the streets containing existing lines of railway, and hence, as abutters, they would seem to have no interest authorizing them to attack those parts of the ordinance extending the life of previous grants; but, granting that they are entitled to raise that question, we do not think the ordinance can be held void on either ground. The statute (sec. 1862, Stats. 1898) gives the municipality power to grant to street railway companies the use of streets, without limitation, save that such grant be made "upon such terms as the proper authorities shall determine." This is certainly a very broad grant of power,—certainly more comprehensive than the statute of Indiana under which the case of *City R. Co. v. Citizens' St. R. Co.* 166 U. S. 557, was decided. In that case the law required that street railway companies should first "obtain the consent of such common council to the location, survey, and construction of any street railway through or across the public streets of any city, before the construction of the same;" and it was held that, where a franchise had been granted in 1864 to a street railroad company for the term of thirty years, the unexpired franchise might legally be extended in 1880 (fourteen years before its expiration) for the term of seven years, so that it would not expire until 1901, and that the continued operation of the road was sufficient consideration for such extension. The case seems strictly applicable here. In the present case some of the existing franchises already owned by the defendant railway company expired in the year 1924, and some in succeeding years, and they

were all extended in terms until the year 1934. We are unable to see that there was lack of power to do this, or that the extension of time was unreasonable. Many of the franchises were granted in very recent years,—some of them as late as the year 1890; and franchises for terms of forty and fifty years, and even longer, are frequently upheld by the courts. We have been unable to find, by an examination of the ordinance, that its terms are unreasonable,—at least, to such an extent as would justify a court in declaring it void. To arrive at such a conclusion, the unreasonable character of the ordinance ought to be very clear.

5. We pass now to a number of objections which may be considered together. They are, in effect, objections to the regularity of the council proceedings in the adoption of the ordinance. It is said that sec. 940*b*, Stats. 1898, which requires the application for the franchise, containing the substance of the privileges asked for, to be filed with the city clerk and published in the official paper for not less than two weeks previous to action on such publication, was not complied with. It is also said that certain provisions of the city charter, requiring all ordinances to be referred to appropriate committees, and not to be acted upon except after report made by the committee, have not been complied with. It is also said that it appears that the officers of the railway company used corrupt methods in securing the passage of the ordinance, in that they agreed to pay large sums to certain citizens to induce them to cease their opposition to the passage of the ordinance.

It is sufficient to say with regard to these claims that, whatever may be the rule elsewhere, it has been held in this state that these questions cannot be raised at the suit of private parties. *Stedman v. Berlin*, 97 Wis. 505. That case was a taxpayer's action in equity brought to set aside the grant of a franchise to build and maintain public waterworks in the city of Berlin. The grantee of the franchise had

accepted the franchise and given bond for the performance of the requirements of the ordinance, but had not commenced to construct the plant. It was charged in the complaint that the franchise was void because the provisions of sec. 940*b*, Stats. 1898, had not been complied with, and that it had been procured by the grantee by means of improper and undue influence exercised by him upon the members of the common council. This court held, however, that the remedy to set aside a franchise irregularly or fraudulently granted, under the circumstances there presented, was by *quo warranto* or *scire facias* at the suit of the state, and not in an equitable action at the suit of private parties.

The present case is substantially identical in its essential facts with the one just cited. It is true that no formal acceptance of the ordinance had been placed on file, but the company was shown to be in possession of its already constructed lines, and transacting its business thereon, selling tickets at the reduced rate, and performing the obligations required of it by the terms of its new franchise. It was certainly quite as much in the exercise of the privileges conferred by the franchise as was the grantee of the franchise in the *Stedman Case*, who had not commenced even to build his plant. The principle here adopted is quite analogous to that applied to an application for leave to bring action on behalf of the state to annul the franchises of such a corporation on account of misuse or nonuse thereof. Such leave will not be given as a matter of course for every dereliction of duty, but it will be granted, or not, as the interests of the public seem to demand. *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496. So, here, upon the facts presented, it is not at all certain that the present franchise would be set aside at the suit of the state. It appears that a notice containing a full copy of the proposed ordinance was published for more than two weeks prior to the final passage of the ordinance. This is claimed to have been insufficient,

by the plaintiff, because it should have been published two weeks before any action was taken by the common council, and because the ordinance was amended in some minor details just before passage. Now, it may be a serious question whether sec. 940*b*, Stats. 1898, means that the publication shall be made for two weeks before any action, however slight, or before final action. The section simply says "before action." It appears also that the ordinance as originally presented was referred to a select committee, who reported a substitute ordinance; and thus it is claimed that the requirements of the charter have been met, notwithstanding there were some minor amendments made after the report, and before passage. Furthermore, a resolution was passed by the council at the same meeting when the ordinance was passed granting the same franchises in identical terms with those contained in the ordinance; and it is claimed, and with apparent reason, that, if the ordinance fails, still the resolution may be effective. Sec. 1862 does not require the franchise to be granted by ordinance. Hence it may undoubtedly be done by resolution. The resolution was first introduced on the night of its passage. Hence the publication of notice was for two weeks previous to "any action," as well as to final action, and the charter provisions as to the reference of ordinances to committees does not apply to resolutions. Considering these facts, and the evident strenuous attempt to conform to all statutory requirements, it may be doubtful whether any court would feel that valuable franchises should be forfeited, even at the suit of the state, even though it might conclude that there was some irregularity in the proceedings. It is enough, however, that the question is not open in this action.

The same considerations, in effect, apply to the charge of corrupt practices. It is not charged that any member of the council was corrupted, but that certain citizens who opposed the ordinance were bought off with money. This

charge is explained in the answer as follows: The ordinance allowed the railway company to use a viaduct for the building of which a number of property owners had paid about $8,000, special assessments. As the building of the railroad across the viaduct turned it practically into a railway bridge and diminished its usefulness to the property owners who had contributed to its erection, they objected to such use unless they were repaid what they had put into it over and above their share as general taxpayers. In this situation, the officers of the street railway company agreed to make good to the property owners what they had paid by way of special assessments. This was done without concealment, but was known to all. Even were we disposed to find fault with the transaction, the rule of the *Stedman Case* plainly covers it.

We have discussed the case as presented upon the second motion to vacate, and any separate discussion of the first motion is unnecessary. Our conclusion is that both motions should have been granted.

By the Court.—Orders reversed, and action remanded with directions to vacate the preliminary injunctional order and for further proceedings according to law.

CUDDY, Respondent, vs. FOREMAN, Appellant.

September 25—October 12, 1900.

107 519
110 *431
d110 *432

Vendor and purchaser of land: Oral agreement: Statute of frauds: Recovery of earnest money: Evidence: Change of possession: Court and jury: Refusal of wife to sign mortgage: Failure of title: Damages.

1. In an action to recover earnest money paid on an oral agreement for the purchase of a hotel, owned by the vendor and vendee as tenants in common and operated by them in partnership, one of the

important questions was whether the vendee (the plaintiff) was put into possession of the hotel pursuant to the alleged oral contract. There was evidence tending to show the affirmative of that proposition, and that the plaintiff had exercised exclusive control over the property. On cross-examination plaintiff, who had testified that he did not take possession thereof, was asked if, during such time, he did not assume to be the owner of the property and offer to sell it to K. An objection to such question as immaterial was sustained. *Held*, that the evidence was material, as tending to show whether the conduct of the plaintiff was consistent or inconsistent with his claim that no change in possession had taken place.

2. Such evidence was also admissible as original, independent evidence, because it bore upon the credibility of the plaintiff's testimony, because it tended to explain the purpose of the parties in respect to the acts on which the claim of change of possession in fact took place, and because the only objection made was that it was immaterial.

3. Where the defense interposed in such case was that plaintiff was so put into possession as to take the oral sale out of the statute of frauds, it was error to exclude evidence tending to show that, while the alleged vendee was in exclusive possession, he conducted the business for his sole benefit and profit, such evidence being admissible as explaining the nature of the vendee's possession.

4. In such a case evidence tending to show that a deed of the hotel from plaintiff to defendant, reciting a consideration of $2,500, was executed and delivered in pursuance of a second oral contract, whereby, among other things, all existing claims, including that on which the action was brought, were mutually released, should have been admitted. It did not contradict the deed, which did not purport to evidence the entire contract, and was directed to the establishment of the entire contract.

5. The fact that the wife of the vendee in an oral contract for the sale of land refused to sign a mortgage required to be given in order to enable him to carry out such contract, and that thereupon the vendor told him he might have time to carry out the deal, did not change the vendor's right to insist upon the contract being carried out as before, nor make the contract conditional.

6. In an action to recover back earnest money paid on an oral contract for the conveyance of land, the question whether there was a change of possession of the property — thus taking the contract out of the statute of frauds — is for the jury, if there is credible evidence from which a finding in that regard could reasonably be

made in the vendor's favor: it is not necessary that such change be established beyond dispute.

7. The fact that the vendor in an oral contract to convey an interest in land is not the owner of the entire interest he contracts to convey does not affect the validity of the contract. If he puts the vendee into possession so as to take the contract out of the statute of frauds, he becomes liable to him in damages to the extent to which he is unable to perform his agreement.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action to recover $100 paid by plaintiff on a verbal agreement to purchase an undivided one-half interest in a hotel and the furniture therein, on the ground that the agreement was void by the statute of frauds. Defendant answered that plaintiff took immediate possession of the property as owner upon payment of the $100, and retained and enjoyed the property exclusively for a considerable period of time, when it was agreed that the trade should be declared off and that defendant should retain the $100 as damages, and that, pursuant to such agreement, plaintiff redelivered possession of the property to defendant. Defendant further answered that, on or about the time the trade was declared off, plaintiff conveyed to defendant and his partner, William Foreman, a one-half interest in the furniture contained in the hotel and the books and books of account of the firm of Cuddy & Foreman Bros., who had theretofore run the hotel, and also released defendant and said William Foreman from all claims he had against them or either of them, for the sum of $2,500.

At the close of the evidence the court directed a verdict in plaintiff's favor for the amount of his claim, upon the ground that there was no proof of a settlement between the parties and release of the claim in suit; that the verbal contract of sale of the hotel property was not in all its terms clearly shown; and that it was not shown beyond dispute that possession of the property was delivered to plaint-

iff pursuant to the verbal agreement. Defendant excepted to adverse rulings on questions of evidence and to the granting of plaintiff's motion for the direction of a verdict. Judgment was entered in plaintiff's favor, and defendant appealed.

Daniel H. Grady, for the appellant.

J. H. Rogers, for the respondent.

MARSHALL, J. One of the important questions presented by the pleadings was in regard to whether respondent was put in possession of the subject of the sale pursuant to the alleged verbal contract between him and appellant. There was evidence tending to establish the affirmative of that proposition, and that for a period of about eleven days respondent exercised exclusive control of the property. For the purpose of explaining the nature of respondent's possession during such period, he was asked on cross-examination if he did not, during that time, assume to be the owner of the property and offer to sell it to C. W. Kelly. That was objected to as immaterial and the objection was sustained. No reason is perceived why the evidence was immaterial. Plaintiff claimed that he did not take possession of the property, and that the delivery of the keys to him, and other acts indicative of a change of possession in accordance with the verbal contract, were not intended by the parties to have that effect. In that situation, evidence of the conduct of plaintiff, after the happening of the events which point to a change of possession of the property, consistent with such change and inconsistent with his claim that no change in fact took place or was intended, was proper. The evidence was admissible on cross-examination because it bore on the credibility of the evidence of respondent that he did not take possession of the property as claimed by appellant. It was admissible as original, independent evidence, because it tended to explain the purpose

of the parties in respect to those acts upon which the claim that a change of possession in fact took place was based; and it was proper to draw out the evidence on cross-examination independent of the examination in chief, the witness being a party; and further, because the only objection made was that the evidence was immaterial. *Weadock v. Kennedy*, 80 Wis. 449.

The subject of the competency of evidence of the character of that called for by the question under discussion was considered at considerable length by this court in *Roebke v. Andrews*, 26 Wis. 311. In delivering the opinion of the court Mr. Justice PAINE said, the doctrine rests on the elementary principle "that statements accompanying any act explanatory of its character are admissible in connection with the act itself." That principle will be found applied in a great variety of circumstances, as will be seen by an examination of the cases cited in the opinion. In *Kelley v. Kelley*, 20 Wis. 443, statements of a person as to his purpose in placing a building on land of which he was possessed were held material on the question of whether the building became a part of the real estate. In *Meade v. Black*, 22 Wis. 241, the plaintiff endeavored to show possession of real property by proof that the person actually occupying it was his tenant. The declaration of the occupant explanatory of his possession was held to be material. In *Hollister v. Young*, 42 Vt. 403, a party was permitted to show the circumstance of his bringing an action for trespass to realty while he was in possession thereof as bearing on the question of whether his possession was adverse. In *Perkins v. Blood*, 36 Vt. 273, 282, the circumstance that a person, when applied to to sell certain property of which she was formerly possessed, replied to the plaintiff that she would not sell the property, that she intended her brother should enjoy it as long as he lived, was held admissible as bearing on the fact in issue of whether such person, when she left the property, intended to aban-

don it. In *Blake v. Graves*, 18 Iowa, 312, offers made by a person, while in possession of property, to sell it, were held admissible as bearing on the question of whether the possession was that of owner. These illustrations amply show that the evidence ruled out should have been received. It had a material bearing on the question of whether plaintiff was in possession of the property as sole owner. That, obviously, could not have been the case unless there had been a change of possession pursuant to the verbal contract so as to take such contract out of the statute of frauds.

If circumstances which characterize and explain human action, when so closely connected therewith as to fall within the limits of *res gestæ*, were not permitted to be given in evidence, the judicial search after truth would often fail where common sense and common reason point clearly the way to the desired object. Of course it requires careful attention and the exercise of sound judgment and discretion on the part of a trial judge, to determine when circumstances are so closely connected with the main fact in issue as to characterize and explain it, and on that ground to render proof of such circumstances admissible in evidence. There comes in the judicial function, and when it is exercised the result will not be disturbed unless the ruling appears to be clearly wrong. Errors in such matters will not often occur if the guides laid down in the books are carefully observed. "The principal points of attention are," says Prof. Greenleaf, "whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." 1 Greenl. Ev. § 108.

Evidence was offered and ruled out to show that during the period appellant claimed respondent was in exclusive possession of the hotel property, he conducted the business for his sole benefit and profit. The evidence should have been received. If respondent controlled the property to the

exclusion of appellant, and conducted the business as the only person interested therein, those circumstances were clearly admissible as explanatory of the nature of the possession, within the rule above discussed. The evidence was not material as showing an offset to or payment, in whole or in part, of respondent's claim, but it was material in that the circumstance was consistent with appellant's theory that there was a change of possession of the property pursuant to the alleged verbal contract of sale and inconsistent with the opposite theory. It bore directly upon one of the vital questions in issue. Circumstances so closely connected with an act as to be inseparable from it and to point with reasonable clearness to its nature, are under some circumstances the strongest kind of evidence. Any number of witnesses, testifying directly contrary to the truth, pursuant to an agreement upon the false story, may relate it in such a way as to defy all efforts to discover the truth by opposing direct evidence; yet proof of the circumstances accompanying the conduct of the person under investigation may point to where the truth lies with such certainty as to leave no reasonable doubt in respect to it.

Evidence was received that appellant and his partner, William Foreman, a short time after the aforesaid verbal agreement was declared off, made an agreement with respondent whereby the former were to give the latter $2,500 for his interest in the hotel property and pay the outstanding indebtedness against appellant and respondent, as the firm of Cuddy & Foreman Bros., and to release respondent from all claims held by them against him, and in consideration thereof respondent agreed to sell such property to appellant and said William Foreman on such terms, including respondent's interest in the book accounts of the firm of Cuddy & Foreman Bros., and to release appellant and said William Foreman from all claims which respondent had against them or either of them; that a conveyance of re-

spondent's interest in the hotel property was made accordingly, expressing a consideration of $2,500. On respondent's motion to strike out that evidence, the court ruled that it might stand, though not competent for any purpose other than to show the nature of the previous conduct of the parties as regards a change in the possession of the property, pursuant to the first alleged verbal contract, and that on such subject it was rather in favor of respondent than against him. Further evidence was offered to show the scope of the second verbal agreement and that it included a release of the claim in suit, which was ruled out on the theory that, the verbal contract having been closed by the deed, the transactions leading up to that could not be inquired into by parol evidence.

The purpose of the rejected evidence was to show the actual consideration for the deed,— that it included, among other things, the claim in suit. It did not tend to contradict or vary any written contract, but to prove those parts of the entire verbal contract not included or intended to have been included in the deed. The evidence was admissible upon elementary principles and according to repeated decisions of this court. *Mills v. C. & N. W. R. Co.* 103 Wis. 192; *Kickland v. Menasha W. W. Co.* 68 Wis. 34; *Becker v. Knudson*, 86 Wis. 14, 18; *Beckman v. Beckman*, 86 Wis. 655, 660; *Salter v. Bank of Eau Claire*, 97 Wis. 87; *Morgan v. South Milwaukee L. V. Co.* 97 Wis. 275, 278; *Stites v. Thompson*, 98 Wis. 330; *Hannan v. Oxley*, 23 Wis. 519.

The general rule is that the consideration expressed in a deed is not conclusive; that parol evidence is admissible to show that the conveyance was based upon a different consideration than that expressed. That rule has this limitation: parol evidence is not admissible to show a different consideration than that expressed in the writing if it be inconsistent therewith. *Powers v. Spaulding*, 96 Wis. 487. In the case before us the evidence rejected was directed to the

establishment of the entire contract between the parties, a part of which only was executed by the making and delivery of the deed. It did not contradict the deed, because the writing did not purport to evidence the entire contract. It was clearly admissible. *Frey v. Vanderhoof*, 15 Wis. 397; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Hubbard v. Marshall*, 50 Wis. 322.

What has been said requires a reversal of the judgment, but the reasons given by the circuit court in granting the motion to direct a verdict in respondent's favor are challenged as insufficient, and will be considered in order to prevent a repetition of errors committed in granting such motion. Such reasons are: (1) there is nothing to show that the claim of $100 was included in a settlement between the parties at the time the deed was made of respondent's interest in the hotel property to appellant and his partner; (2) the verbal contract was conditional; (3) if the contract was not conditional, the facts and circumstances do not show, without dispute, as they should in order to submit the question to the jury, that there was a surrender of the subject of the contract of sale to respondent.

1. The answer to the first reason above mentioned is that the evidence, offered to show that the claim for $100 was settled at the time of the consummation of the second trade, was rejected by the court. It was not the fault of appellant that the trial closed without any evidence being produced to sustain his defense of settlement. That situation was brought about by the error of the trial court, and obviously cannot be sustained as a good ground for holding that the defense of settlement failed.

2. The fact that respondent's wife refused to sign a mortgage in order to enable him to carry out the verbal contract, and that, upon appellant being informed thereof, he said to respondent that he might have time to carry out the deal, is the foundation for the learned court's decision that the evi-

dence shows that the contract was conditional. The record shows that when the verbal contract was entered into it was not made to depend on respondent's wife signing a mortgage. The idea that there was a condition affixed to the agreement seems to be wholly without evidence to sustain it. After the agreement was completed, the down payment of $100 made, and respondent placed in the absolute possession of the property, according to appellant's claim, respondent stated to him that he would probably lose his $100 because his wife would not sign a mortgage. Upon such statement being made, appellant said he was not in any hurry and that respondent might have time. That did not change the contract previously entered into in any respect. Appellant had the same legal right to insist upon its being carried out as before, though he was morally bound to allow respondent a reasonable time to raise the money to complete his payment. If there was actually a change of possession of the property, so as to take the verbal agreement out of the statute of frauds, the nonconsent of the wife to assist her husband in raising money to complete the purchase obviously was no defense to an action for specific performance.

3. We are unable to understand upon what principle of law the trial court relied in deciding that the controversy as to the making of the verbal contract could not be submitted to the jury so long as the fact of a change of possession of the property pursuant to such contract was not established by evidence beyond dispute. The ruling strikes us as so palpably erroneous as not to justify saying more than is necessary to so decide. Certainly the controversy as to a change of possession of the property was for the jury to decide so long as there was credible evidence upon which a finding in regard to it could reasonably be made in appellant's favor. The ordinary rule, as to when a question ceases to be one of fact for the jury and becomes one of law

for the court because only one reasonable inference in regard to it can be drawn from the evidence, applies to this case the same as to all other jury cases. Appellant testified that he and respondent met at the hotel on Monday morning; that after some conversation respecting either one or the other becoming sole owner of the property, respondent said: "I will give or take $3,500 for a one-half interest and assume the mortgage;" that appellant replied, "If you buy me out I step right out;" to which respondent said, "Yes;" that appellant then said, "You can have it;" and respondent replied: "All right. A bargain is a bargain. Now I will give you $100 down to bind the bargain;" that thereupon the money was produced and paid; that about noon appellant delivered to respondent his keys to the cellar, the safe, and the mail box, saying, "I am through, I have got nothing more to say here;" that he had nothing further to do with running the hotel business for some eleven days, during which time respondent occupied the property and managed the business as his own. Appellant further testified that in the afternoon of the day the trade was made, respondent remarked to him that he would have to lose his $100 because his wife would not sign a mortgage to enable him to raise the balance of the purchase money, and that appellant thereupon said to respondent: "You said when you bought me out that you had the money. You can have a week or ten days, or two weeks if you want. I am in no hurry. You go right along and do the business." Respondent's version of the verbal contract does not differ materially from appellant's. It appears to be established beyond controversy, leaving as the sole dispute on this branch of the case the question of whether there was a change of possession of the property so as to take the contract out of the statute of frauds. On that issue there was the evidence of appellant, which, if true, established the fact in his favor. It was corroborated by the bookkeeper and by a number of

circumstances. In that situation of the case there was certainly no warrant for taking the case from the jury. If the change of possession occurred as claimed by appellant, the contract was taken out of the statute of frauds and the down payment of $100 became appellant's property. If there was not such part performance of the verbal contract as to take it out of the statute of frauds, but the claim of respondent for a return of his $100 was a part of the consideration for which he received the $2,500 mentioned in the deed, the $100 became the property of appellant.

A point is made that appellant did not own an undivided one-half interest in the property and that it is not shown that he had authority to sell any other interest than his own. That is immaterial. If he agreed to sell an undivided one-half interest in the property and put the respondent in possession of the subject of the sale, so as to take the contract out of the statute of frauds, then a cause of action for specific performance was perfect and he became liable in damages to the extent that he was unable to perform his agreement. *Conrad v. Schwamb*, 53 Wis. 372.

To recapitulate: The court erred in rejecting evidence of circumstances characterizing the possession of the property by respondent after the making of the verbal contract, which tended to show a change of possession as alleged by respondent. The court further erred in holding that the making of the deed, in part execution of the verbal agreement regarding a sale of respondent's interest in the property to appellant and his partner, precluded appellant from saying that such agreement included a settlement of the claim in suit. The court further erred in granting the motion for a verdict in respondent's favor, such error reaching each and all of the grounds assigned for the ruling.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

CASSODAY, C. J., took no part.

NELSON and others, Appellants, vs. JACOBS and others, Respondents.

September 25 — October 12, 1900.

Nelson v. Stephens, ante, p. 136, followed.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

For the appellants the cause was submitted on the brief of *Bashford, Aylward & Spensley.*

[No appearance for the respondents.]

By the Court.— The facts stated, the assignment of errors, and the questions involved in this case are the same as were involved in the case of *Nelson v. Stephens, ante,* p. 136. The conclusion in that case was adverse to the defendants here. The case having been tried, and the evidence being before the court, the judgment is reversed, and the cause is remanded with directions to enter judgment for plaintiffs for the penalty of the bond, with costs.

CASSODAY, C. J., took no part.

AMES and another, Appellants, vs. LAMONT, Respondent.

September 25 — October 12, 1900.

Real-estate agents: Contracts: Performance: Breach: Consideration.

1. The fact that plaintiffs, who had been employed by defendant as agents to sell his farm under an agreement that they should have as commissions whatever a purchaser would pay over $10,000, offered the farm for a greater sum to N., who promised to examine it and make an offer, and to deal only with plaintiffs, but purchased it from defendant for $10,000 after plaintiffs had notified defendant of the name of the expected purchaser and the amount asked, does not show performance of an express contract of employment, since performance of such contract consists in providing a purchaser ready, able, and willing to pay the price fixed.

2. There being no evidence in such case that defendant, after such notification, did any act, inconsistent with the utmost good faith towards plaintiffs, to deter N. from purchasing at the price named by the agents, or suggested the possibility of acceptance of a less price, and the only evidence offered as to the transaction between defendant and N. being that ultimately sale was made for $10,000, no right to recover damages founded on defendant's breach of the contract was established.

3. The fact that plaintiffs' services were rendered on the faith of the express promise to pay therefor only the excess obtained over $10,000 excludes any inference or implication of a different understanding by them or promise by defendant; and they cannot recover upon an implied contract to pay the reasonable value of their services in finding a purchaser.

4. Evidence that plaintiffs reported to defendant that they had offered the farm to N. at $45 an acre (a larger price than $10,000 for the whole); that he thereupon replied "All right, I will ask him [N.] $45 an acre for the farm;" that the principal thereafter sold the farm to N. for $10,000; and that such reply was made after all the services for which plaintiffs sued had been rendered, is *held* insufficient to show any consideration for defendant's promise that he would ask N. $45 per acre for the farm.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The evidence tended to prove that the defendant employed plaintiffs, real-estate agents, to find a purchaser for his farm of about 230 acres, containing 218 acres within fences, exclusive of highways and railroad, and agreed to give them as commission whatever any purchaser found by them would pay for the farm over and above the sum of $10,000, no exclusive authority being given, nor express restriction placed on defendant's right to sell meanwhile; that plaintiffs incurred some expense and labor in seeking purchaser; that the farm was offered at the price of $45 per acre for 230 acres to one Nesbit, who promised to examine it, and was then to make his offer, and who promised that he would deal through the plaintiffs. Plaintiffs thereupon notified the defendant that they had got a purchaser for the farm, nam-

ing him, and stating the price asked, and the defendant responded, "All right, I will ask him $45 an acre for the farm." Two or three weeks afterwards the plaintiffs learned that the defendant had closed a bargain with Nesbit at $10,000, whereupon they demanded and he refused to pay any commission. Plaintiffs' services were reasonably worth $350. At the close of plaintiffs' evidence the court entered a judgment of nonsuit, from which they appealed.

For the appellants there was a brief by *Tenney, Hall & Tenney*, and oral argument by *F. W. Hall.*

G. S. Martin, for the respondent.

DODGE, J. The case of *McArthur v. Slauson*, 53 Wis. 41, is conclusive against any recovery by plaintiffs founded upon performance of the express contract of employment; for no evidence is offered that their alleged customer was ever ready or willing to pay any price in excess of $10,000. The utmost extent of that evidence is that he was willing to take the farm into consideration, and, as the plaintiff *Ames* testifies, "was then to make his offer." Performance of the contract consists in producing a purchaser ready, able, and willing to pay the price fixed. *McArthur v. Slauson, supra.* Nor have plaintiffs established a right to recovery in damages founded on defendant's breach of the contract. It may well be that, when a real-estate agent produces a customer ready to consider the property and notifies the owner, the latter owes a duty in good faith to endeavor to hold the purchaser up to the price nominated, and to refrain from any act to deter him therefrom, or, while still considering, to suggest possibility of acceptance of a less price. There is, however, no scintilla of evidence of any such conduct on defendant's part. Plaintiffs did not attempt to offer any proof of the transaction between Nesbit and defendant except that ultimately sale was made at $10,000. This fact is in no wise inconsistent with the utmost good faith and

diligence on defendant's part to obtain the price named, until it was definitely ascertained and determined that Nesbit would not pay it nor any price above $10,000.

Appellants, however, seek to avoid the rule of *McArthur v. Slauson, supra*, by abandoning the express contract to pay only excess over $10,000, and suing upon an implied contract to pay the reasonable value of their services in finding any purchaser. They invoke the elementary rule that he who knowingly avails himself of the benefits of another's services is presumed by the law to have intended to pay for them their reasonable value, and a promise so to do is implied. This rule is, however, restricted by limitations as elementary as itself, such as that the services must have been rendered and received under circumstances to warrant the inference of expectation and intention of payment. If there is an express agreement to which such services may be ascribed, the expectation of payment is presumptively according to the terms expressed. An express agreement to pay one dollar per day for certain services excludes any implication of promise to pay fair value, whether more or less. In the case before us the plaintiffs' services were obviously rendered on the faith of the express promise to pay therefor only the excess obtained over $10,000. This fact wholly excludes any inference or implication of a different understanding by them or promise by defendant. In the presence of the express, there is no room for an implied, promise. *Tietz v. Tietz*, 90 Wis. 66.

Appellants urge also that the complaint sets forth another promise made by defendant, namely, that he would ask Nesbit $45 per acre for his land. They claim recovery for breach thereof. The consideration for any such promise is not very obvious, since it was made after all of plaintiffs' services had been rendered. Apart from that objection, however, no breach of such promise is alleged or proved. As previously pointed out, defendant may have demanded

that price most persistently. Plaintiffs have not gone far enough with their proofs to warrant recovery on this theory, even if it could be entertained under their complaint.

The circuit court rightly decided that no cause of action had been established, and properly ordered nonsuit.

By the Court.—Judgment affirmed.

CASSODAY, C. J., took no part.

VAN DOREN and another, Appellants, vs. ROEPKE and another, Respondents.

September 25 — October 12, 1900.

Statute of frauds: Contract for sale of lands: Memorandum: Requisites.

1. A memorandum, signed by both parties, reciting, among other things, that, in consideration of the purchase of certain real estate, sufficiently described, for a specified price, the seller agrees to sell a certain stock of merchandise and store furniture and fixtures at cost, less an agreed discount, payments to be made at agreed times, satisfies the statute of frauds (sec. 2304, Stats. 1898), since it does not require resort to parol evidence to ascertain the terms of the contract, and is plain, distinct, and definite as to parties, property, price, and terms of payment.
2. Under said sec. 2304 it is not necessary that the memorandum should contain apt and definite words expressing the agreement to convey: it is sufficient if, from a consideration of the whole contract, it can be gathered that it is the intention of one party to convey and of the other to purchase.

APPEAL from an order of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action for the specific performance of the following contract:

"Memorandum of agreement made this 10th day of July, A. D. 1899, between Roepke & Meisner, partners, of Bir-

namwood, Wis., parties of the first part, and Van Doren & Andrews, parties of the second part, witnesseth:

"That the parties of the first part hereby agree to sell to the second part the entire stock of merchandise now in their store, on lots 1 and 2, block 10, of the village of Birnamwood, and in transit on orders for goods made up to this date, provided the same cannot be canceled, and all store furniture, including counters, show cases, desks, tables, furnace, scales, etc., at cost price, not including freight, less five per cent. discount, and to transfer the insurance on building and stock now carried by parties of the first part. The above agreement is made in consideration of the purchase of the aforesaid lots 1 and 2, block 10, by the parties of the second part for the sum of $3,000.

"The parties of the second part agree to pay $1,000 for said stock of merchandise on the completion of the inventory of stock, and the balance in sixty days thereafter.

"ROEPKE & MEISNER.

"VAN DOREN & ANDREWS."

The complaint, by apt allegations, sets out the making of the contract and its delivery to plaintiffs, an offer to perform on their part, and a refusal of performance by defendants. A demurrer was interposed and sustained on the ground that the complaint did not state a cause of action. Plaintiffs appeal.

For the appellants there was a brief by *Wheeler & Van Doren*, and oral argument by *R. N. Van Doren.*

For the respondents there was a brief by *B. A. Cady* and *Bump, Kreutzer & Rosenberry*, and oral argument by *E. L. Bump.*

BARDEEN, J. The only question argued at the bar is whether the contract set out in the complaint is sufficient under sec. 2304, Stats. 1898. That section provides that every contract for the sale of lands or any interest in lands

shall be void "unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made or by his lawfully authorized agent." This section has been before the court in many cases in which the requisites of the "note or memorandum" of the contract have been discussed. One of the latest expressions of this court on that question may be found in *Harney v. Burhans*, 91 Wis. 348, where it is said: "It is not necessary that the memorandum should contain all the parts of the contract, or be formal. No matter how bunglingly it may be drawn, it will satisfy the statute of frauds if it contains all the essential terms of the contract, either by its terms or by reference to other writings, so that it will not be necessary to resort to parol evidence to explain it. It must be definite in respect to the intention of the parties, who they are, their relation one to another, who is the seller, who the buyer, the property, the price, and the terms of payment." The respondents admit that all of these requirements have been met in the contract in suit, except that there are no explicit words expressing the agreement on their part to convey, or of the other parties to purchase. To sustain this contention they appeal to that portion of the contract which says: "The above agreement is made in consideration of the purchase of the aforesaid lots 1 and 2, block 10, by the parties of the second part for the sum of $3,000."

A primary rule in the construction of a contract is that it must be construed as a whole, and not in fragments. *Hosmer v. McDonald*, 80 Wis. 54. Hence the attempt to test the contract by reference to separate or detached portions must fail. Neither is it necessary that the memorandum should contain apt and definite words expressing the agreement to convey. It is sufficient if, from a consideration of the whole contract, it can be gathered that it is the intention of one party to convey and of the other to purchase; the other conditions

above mentioned being present. Thus, in *Schweitzer v. Connor*, 57 Wis. 177, the contract recited the receipt of a small payment of money, and then said: "This amount is paid to secure that portion" of certain described land at a stated price per acre, etc. The language quoted was all that the contract contained with reference to the undertaking of the party selling, and the court held that it contained all the elements of a complete contract, and parol evidence was inadmissible to show that the seller reserved title to the timber on the land. The purpose of the statute was to require all contracts for the sale of lands, or of an interest in lands, to be evidenced by some note or memorandum in writing, so as to preclude the necessity of a resort to parol evidence. When such note or memorandum contains the requisites hereinbefore noted, no matter how bunglingly it may have been drawn, the court is bound to consider it the contract of the parties, and enforce it accordingly.

Reading this contract as a whole, we do not very well see how any one can mistake the intention of the parties. The obligations of the parties were mutual. In consideration of the purchase of the real estate, which is sufficiently described, by the plaintiffs, the defendants also agree to sell the personal property mentioned. The clear implication from the language used is that the defendants agree to sell the real estate for $3,000, and, to make it more certain, they agree specifically to transfer the insurance on the building. It requires no resort to parol evidence to ascertain the terms of the contract. They are plain, distinct, and definite, as to parties, property, price, and terms. The fair implication from the language used is that the defendants have bound themselves to convey, and by acceptance the plaintiffs have bound themselves to purchase. The mutuality of the contract being determined, nothing remains for the courts to do, when appealed to, except to enforce it, unless some cir-

cumstances are shown which indicate that its enforcement would be inequitable.

By the Court.—The order appealed from is reversed, and the cause is remanded with directions to overrule the demurrer and for further proceedings according to law.

CASSODAY, C. J., took no part.

JORDAN and another, Respondents, vs. ESTATE OF WARNER, Appellant.

107 539
e115 [11]438

107 539
117 [2]333

September 25 — October 12, 1900.

Estates of decedents: Accounting: Compulsory reference: Mortgages: Defeasance: Equity: Evidence: Legal or equitable action: Subject of the action: Election of remedy: Appeal: Immaterial and prejudicial error: Exceptions: Mortgagor and mortgagee: Tax titles: Usury: Tender of principal: Pleading.

1. Under sec. 2864, Stats. 1898 (providing for compulsory references of all issues in the action, whether of law or fact, when the trial of an issue requires the examination of a long account on either side), a compulsory reference was proper, where, on appeal from the allowance by the county court of a claim against a decedent's estate, the trial in the circuit court involved matters of account as to numerous tracts of land, against which decedent had purchased tax certificates under an agreement with claimant to release them on being reimbursed, the transactions of such accounts covering a long period of time, and consisting of numerous debit items of payments to protect the lands from tax claims, and numerous credit items of sums realized from sales, redemptions, rent, trespass, etc.
2. Whatever form a conveyance of real estate, absolute on its face but given as a mortgage, may take, its true character may be shown by evidence *aliunde*, including parol evidence, whether the question be raised in a direct action for equitable relief or be incidental to relief demanded in an action at law: it is not essential that the mortgage feature should have been omitted by fraud or mistake.
3. A mortgage is a contract whereby an interest in property is pledged as security, and if in its execution a paper is made evidencing a part of it, and other papers be made at the same time evidencing other parts, all may be resorted to, and all must be construed to-

gether, if necessary, in order to determine the real nature of the transaction.

4. In such case if any of the papers satisfy the statute of frauds (sec. 2302, Stats. 1898) as to the necessity of the estate or interest in lands created *inter partes* being created in writing, the other essentials may be shown, if not evidenced by such writings, either by other writings which form a part of the same transaction, or by parol evidence.

5. In an action to recover from a decedent's estate damages for the unlawful sale by decedent of lands deeded to him by plaintiffs under a contemporaneous written agreement of decedent to reconvey on payment of a stipulated sum and interest, the sole primary subject of the litigation is the alleged indebtedness of the estate to the plaintiffs, and the question, therein presented for adjudication, as to whether the two instruments constitute a mortgage, is a mere incident of the primary right sought to be vindicated. A motion to require plaintiffs to elect on which cause of action they would rely is therefore properly overruled.

6. In an action tried by the court, where the evidence to which the rulings of the court were directed did not vary or materially add to the evidence received without objection, the error in such rulings, if any, is immaterial, because right or wrong they do not affect the final result.

7. Where all the records from which tabulated statements are compiled are before the court, and the witness who made the compilation testifies to their preparation from personal examination of the records, and that he believes the statements to be true, and the opposite counsel have ample opportunity to cross-examine the witness and inspect the records, such tabulated statements are properly received, not as an original, but as a part of the witness's evidence.

8. Plaintiffs executed an absolute conveyance of lands to one since deceased, who at the same time executed and delivered to them a writing, referring to the conveyance, wherein decedent recited that he held claims against such lands, and other land of plaintiffs, for taxes and tax deeds, and that he thereby appointed plaintiffs his agents to sell the lands and account to him for the proceeds. The writing also provided that if, at any time within five years, those proceeds should be sufficient to satisfy a specified amount, with interest, and all other specified claims, plaintiffs would be entitled to a reconveyance of the remaining lands. *Held*, that the relation of mortgagor and mortgagee was created by such writings.

9. In an action to recover damages for the wrongful sale of such lands, it appeared that decedent had obtained tax titles, based on tax certificates which came to his possession while he was the mortgagee of plaintiffs in respect to the lands covered by the tax deeds. *Held*, that such tax deeds were invalid, and that decedent's estate was properly charged with the amount received by him on the sale of such lands.
10. Decedent having secretly, and in violation of his agreements, sold the mortgaged property, no injustice is done his estate by crediting the plaintiffs with the sale price of the lands, and charging them with all sums decedent paid out for tax claims thereon and all other legitimate expenditures; but no credit should have been allowed the estate for services of the decedent in making the sales.
11. Clerical errors in an account as settled by the court, made in preparing findings from minutes which the referee had before him, easily reconciled with the record without changing the final result, are not prejudicial to the appellant.
12. A general exception to a finding covering a large number of matters correctly found with a few not so found, is not sufficient to require the supreme court to review an assignment of error to the erroneous items.
13. Sec. 1692, Stats. 1898, which requires the plea of usury to be supported by proof of a tender of the principal of the debt as a con lition of relief from a usurious contract, and the rule that usury, to be available, must be pleaded, are satisfied by the fact that the usurious contract is set forth in the complaint, which clearly shows the invalidity as to interest, and that the principal of the indebtedness was, long before the commencement of the action, fully paid by credits the debtors received or were entitled to receive from the creditor.

APPEAL from a judgment of the circuit court for Outagamie county: GEO. W. BURNELL, Judge. *Modified and affirmed.*

Plaintiffs filed a claim against the estate of William S. Warner for $4,200, based on facts alleged substantially as follows: November 11, 1884, plaintiffs conveyed to Warner, by deed absolute in form, a large number of tracts of land, particularly describing them, to secure their indebtedness to him amounting to about $3,000. The conveyance was made in part execution of a verbal agreement, which, on the day of the execution and delivery of the deed aforesaid,

was further executed by Warner giving to the *Jordans* a writing worded as follows:

"Whereas, *W. D. Jordan* and *Mary E. Jordan*, his wife, have this day conveyed to me by warranty deed, certain lands and real estate in the towns of Bovina and Maine, in Outagamie county, Wisconsin, and certain village lots in the village of Shiocton in said county, more particularly described in said deed to which reference is here had, and whereas I hold claims against said lands and *other lands* of said *Jordans* for taxes and tax deeds as charged in my book of account at this date, against *W. D. Jordan's* lands, of twenty-seven hundred and forty-six dollars and three cents, besides tax certificates thereon of sale of 1884, and of some other tax claims of said *Jordan's* lands not included in the deed aforesaid, and wishing an agent to sell and dispose of said lands and real estate conveyed to me as aforesaid, I have, this day, appointed and do hereby appoint said *Jordan* such agent, and for compensation, I hereby agree to allow and pay him for such agency for the sale of said lands or any part thereof, all the purchase money on such sales less the amount of tax claims thereon at the time of such sale, held by me, and twenty-five per cent. interest thereon, with costs of deeds, recording, etc., and should net proceeds of such sales at any time within five years so retained and paid to me amount to the said sum of twenty-seven hundred and forty-six dollars and three cents, with fifteen per cent. additional thereto annually, and all expenses incurred by me in reference thereto, and to cover all additional tax claims held by me on the lands of said *Jordan* not included in said amount, with lawful interest thereon at such time, then and in that case, I hereby agree to convey to said *Jordans* any of the lands so embraced in said deed to said *Jordans* and deliver to them all tax certificates and tax claims on all of the lands of said *Jordans* held by me at the time of such settlement.

"Witness my hand this 11th day of November, 1884.

"W. S. WARNER."

After the transaction stated Warner continued, till about February 6, 1896, to protect the lands mentioned in said instrument from tax liens by purchasing tax certificates from year to year or paying the taxes. No considerable amount of land was sold under the agency created by the paper, but *Jordan* took care of all of the property and collected damages from trespassers thereon, paying the money thus realized to Warner, who credited the same to plaintiffs in the land account mentioned in the writing. Warner, in addition to the lands sold with *Jordan's* approval, sold substantially all the rest of the lands without the knowledge of plaintiffs or their approval, and at a much less price than such lands were worth, the vendees being persons who were ignorant of plaintiffs' interest therein. No settlement of the account between the parties, in reference to the matter stated, occurred before Warner's death or has been made with his personal representative. The amount due the plaintiff is not less than $4,200, including damages caused by Warner's wrongfully disposing of the lands, as stated.

The administrator answered plaintiffs' claim by putting in issue the material allegations of fact upon which their claim was based, by pleading the six-years' statute of limitations (sec. 4222, R. S. 1878), and by alleging that Warner rightfully acquired the title to all of the lands by tax titles, which, prior to his death, ripened into indefeasible titles under the statute of limitations (sec. 1188).

The decision of the county court was in favor of the claimants. On appeal to the circuit court a compulsory reference, duly excepted to by defendant, was made, by which the cause was sent to Samuel Boyd to hear, try, and determine. Before the referee, defendant objected to the jurisdiction of the court, also to the receipt of any evidence for want of facts stated in the plaintiffs' claim sufficient to support the same, also to their being allowed to proceed to

trial without first electing upon what cause of action they would rely. All of such objections were overruled and due exceptions were taken to the rulings.

The following are in substance the facts found by the referee from the evidence, so far as such facts are necessary to the decision upon this appeal: May 10, 1881, by agreement between the parties, Warner purchased for *W. D. Jordan* a quantity of tax certificates on the land in question, at a cost to him of $1,010.70, for which sum *Jordan* gave his promissory note to Warner, payable three years after date thereof, with interest at the rate of ten per cent. per annum. At the same time Warner gave to *Jordan* a paper, showing the relations between the parties in reference to the transaction, which is as follows:

"This is to certify that I have bought tax certificates upon the land of *W. D. Jordan* and *Mary E. Jordan*, for which I have paid the sum of one thousand and ten and $\frac{70}{100}$ dollars ($1,010$\frac{70}{100}$), including the amount paid for redemption May 9, 1881, and that I hereby agree to sell to said *W. D. Jordan* the said tax certificates and certificate of redemption for the sum of one thousand and ten and $\frac{70}{100}$ upon the following terms and conditions, to wit:

"As collateral security upon the sale to said *W. D. Jordan* of the said tax certificates and certificate of redemption, the said *W. D. Jordan* gives to me his promissory note, bearing date herewith, for the said sum of one thousand and ten and $\frac{70}{100}$ dollars, payable within three years from the date hereof, with interest at ten per cent. per annum until paid, interest payable annually; and the said *W. D. Jordan* or his lawful representatives shall have the privilege at any time of redeeming any of said certificates of the earliest dates, in order first, and of receiving the same, by paying to me the face amount of the same, with the lawful annual interest of twenty-five per cent. that may have accrued thereon; and when the certificates thus redeemed, with the

twenty-five per cent. interest thereon, shall amount to the sum of one hundred dollars or more, such sum thus paid in redemption may be indorsed upon said promissory note, and the same process may at any time afterwards within the three years from the date hereof, or within such time as the said note may be extended, be repeated, until the said promissory note shall be paid, provided that none of said tax certificates shall be allowed to outlaw, but that all such certificates shall be redeemed by the said *Jordan* or his legal representatives in the manner above provided within five years from the date of such certificates; and provided further, that when the said promissory note shall be paid in full, with the ten per cent. interest thereon, as above, and all expenses incident to this transaction shall be paid by the said *W. D. Jordan*, or his representative, then such of the above-named certificates as shall remain in my hands and the certificate of redemption above referred to I will deliver to the said *W. D. Jordan* or his legal representative.

"Dated May 10, A. D. 1881. W. S. WARNER."

Warner kept a book account of his business thereafter transacted with *Jordan* in regard to said indebtedness and securities, which account was entitled "*W. D. Jordan* Land Account." The account was active till November 11, 1884, charges being made from time to time for expenditures for the purchase of tax claims against the land covered by the certificates mentioned in the written agreement and against other lands owned by the *Jordans*, and credits being given for money received under such agreement, such credits aggregating $1,241.90, when an accounting took place by which the amount of the indebtedness of *Jordan* to Warner was adjusted at $2,746.07 exclusive of tax certificates on lands for 1884 and some other tax claims on *Jordan* lands not included in the conveyance hereafter mentioned. Upon the account being so adjusted a verbal agreement was made between the parties, pursuant to which plaintiffs made a conveyance to Warner and he gave them back a writing,

which conveyance and writing are the ones mentioned in plaintiffs' claim.

For the purpose of convenience, the lands conveyed to Warner will be hereafter referred to as "conveyed lands," and divided into two classes, "A lands" being those sold prior to Warner's death and "B lands" those not so sold. For the same purpose, the lands mentioned in the agreement which were not conveyed to Warner will be referred to as "other lands" and also divided into two classes, "C" standing for such as were sold during Warner's lifetime, and "D" for such as were not so sold.

After the transaction of November 11, aforesaid, Warner purchased a small book for the purpose of keeping a history of each tract of land covered by such transaction, in which book he entered all the lands by separate tracts, except in a few cases where collections of tracts were entered because they were located in the same block in platted lands. Under each such entry Warner noted all the tax claims he held against the tract, indicating that the amount thereof formed a part of the "*Jordan* land account." After the original entries made as aforesaid, Warner continued upon such book the history of his transactions in regard to each tract or collection of tracts of the lands, not closing up the account as to any until it was sold. Upon that event occurring, he balanced the account as to the tract so as to show the amount to which the *Jordans* were entitled pursuant to the transaction of November 11, 1884, and then made a memorandum indicating that such amount was credited in *Jordan's* land account, and it was so entered. The said land account was commenced at about the time the transactions between the parties began in 1881, and was continued by Warner in his own handwriting till the time of his death. The payments made to protect the lands from tax liens were entered in such account as debit items, and all sums realized from sales of or redemptions from tax certificates, or collections on account of illegal certificates, or for rent,

or for trespasses on the lands, or for timber sold, were entered as credit items. Warner took tax deeds in his own name, on certificates owned by him on the lands November 11, 1884, on substantially all thereof, and duly recorded such deeds. The lands were all wild and unoccupied from the beginning to the end of the transactions covered by these findings. *W. D. Jordan* had supervision of all the lands after the arrangements of November 11, 1884. He sold timber, collected trespass claims, and paid all money which he thus obtained to Warner, who credited the same as above indicated. He sold a few tracts of land, and Warner sold the greater part of the balance of the land prior to his death. Up to 1894 the sales were made in separate tracts, with *W. D. Jordan's* approval. After that, sales were made by Warner in collections of tracts regardless of the wishes of the *Jordans*, without their knowledge or consent, and at prices much less than the property was worth.

During the period covered by the foregoing, there was correspondence between Warner and *W. D. Jordan* in which the former uniformly acknowledged that his interest in the lands was limited to the amount due him from the *Jordans* indicated in his land account. Dividing the land account as it appears on Warner's book, so as to show the amount of his investment in each class of the lands at the time of the settlement of November 11, 1884, and also the items included in the settlement which were not liens against the lands, we have the following result:

A lands	$1,087 92	
C lands	716 95	
		$1,804 87
B lands	$343 78	
D lands	55 85	
		399 63
Miscellaneous certificates	$387 65	
Sundry items of expense and interest paid for certificates in excess of ten per cent	153 88	
		541 53
		$2,746 03

Carrying the account forward as to the lands sold, by charging all expenditures made by Warner to acquire tax liens thereon subsequent to November 11, 1884, and for obtaining and recording deeds, and other items of legitimate expense, and rejecting items not found legitimate, and crediting the sale price of the lands and receipts from other sources, such as trespass, rent, timber sold, certificates sold or redeemed, and collections on account of illegal certificates, the result is as follows:

A and C lands as per settlement November 11, 1884,		$1,804 87	
Miscellaneous account		541 53	
Subsequent expenditures on A lands	$1,151 74		
Subsequent expenditures on C lands	586 28		
		1,738 02	
Cost of tax deeds, recording, and compensation for making deeds		86 05	
A lands sold			$3,354 23
C lands sold			2,688 20
Other items of credit			1,027 75
		$4,170 47	$7,070 18
			4,170 47
			$2,899 71

The amount paid by Warner for tax claims against the unsold lands is not included in the above. They are omitted, also, from the final result, it being supposed that the value of the unsold land is amply sufficient to satisfy all demands against the same, and deemed proper to leave that branch of the transactions for adjustment independent of the result of this action except in so far as the facts are found in regard to the same. The relations between Warner and *Jordan* from beginning to end were those of mortgagor and mortgagee. The agreement of November 11, 1884, was usurious, and as the amount, $2,746.03, then found due Warner was fully paid to him, as above indicated, before plaintiffs' claim was filed, no interest should be allowed on that sum or any part thereof. Interest at the legal rate on all the expenditures made by Warner and charged in the land account subsequent

to November 11, 1884, should be allowed to him, because that is in accordance with the express provision in the writing of that date. Interest should also be charged to Warner at the legal rate on all sums received by him after the indebtedness of $2,746.03 was fully discharged. By charging and crediting interest in the manner indicated, up to May 1, 1899, the total sum due plaintiffs is $3,336.15, and for that sum they are entitled to judgment.

The findings show in detail the lands sold and those unsold. Such proceedings were duly had upon the report of the referee that it was confirmed and judgment was rendered in accordance therewith, all of the exceptions taken before the referee being preserved for review upon appeal to this court, and other exceptions being also preserved to the rulings of the circuit court. Defendant appealed.

For the appellant there was a brief by *Duffy & McCrory*, and oral argument by *J. H. McCrory*.

John Bottensek, for the respondents.

MARSHALL, J. The following propositions are presented for review on this appeal: (1) the court erred in referring all the issues to a referee to hear, try, and determine; (2) the demurrer *ore tenus* should have been sustained, (a) because the facts stated in the complaint are not sufficient to constitute a cause of action, and (b) because such facts are not sufficient to show that a court of equity has jurisdiction; (3) plaintiffs should have been required to elect on which cause of action they would rely; (4) there were errors in rulings on objections to evidence; (5) the evidence does not show that the conveyance of November 11, 1884, is a mortgage; (6) there were numerous errors in stating the account; (7) if the contract of November 11, 1884, is usurious, relief therefrom was not proper under the statute without a return of the principal of the debt, or, on equitable grounds, without a tender of the principal of the debt and legal inter-

est. Each of such propositions will be considered so far as the decision of the appeal seems to require.

1. Sec. 2864, Stats. 1898, authorizes a compulsory reference of all issues in an action, whether of law or of fact, when the trial of an issue of fact therein requires the examination of a long account upon either side. This case is squarely within the statute. *Druse v. Horter*, 57 Wis. 644, upon which appellant relies, does not affect the question. That was a suit in equity where, it was said, the law as to compulsory references does apply. There can be no doubt of the discretionary power to refer the case, and we cannot say such power was abused, since the suit was on an account, and the other matters, however necessarily triable with the main issue, were merely incidental to it. *Littlejohn v. Regents of University*, 71 Wis. 437.

2. The suggestion that the demurrer *ore tenus* should have been sustained is based on some decisions of the supreme court of North Carolina, to the effect that a deed, absolute in form, cannot be varied by parol so as to show that it was intended to be a mortgage, unless the mortgage feature was omitted from it by fraud or mistake. That was the common-law doctrine in equity. Other state courts besides that of North Carolina adhere to it. There are several answers, however, to the proposition: (a) The great weight of authority in this country, where the subject is not regulated by statute, including that of the supreme court of the United States, is that, whatever form a conveyance of real estate may take, it may be shown in equity, by parol, to be a mortgage, if that was its purpose in fact; and in code states, where what were formerly actions at law and suits in equity are triable in the same court, the distinctions between them having been abolished, the true character of a conveyance, absolute in form, given as a mortgage, may be shown by evidence *aliunde*, including parol evidence, whether the question be raised by a direct action for equitable relief or

be incidental to legal relief. 1 Jones, Mortgages, p. 282, ch. 8. (b) The rule in this state is in accordance with the great weight of authority. It was early established here, the first case being *Rogan v. Walker*, 1 Wis. 527. The following are a few of the other cases in this court on the subject: *Kent v. Agard*, 24 Wis. 378; *Kent v. Lasley*, 24 Wis. 654; *Harrison v. Juneau Bank*, 17 Wis. 340; *Sable v. Maloney*, 48 Wis. 331; *Hoile v. Bailey*, 58 Wis. 448; *McCormick v. Herndon*, 67 Wis. 648; *Becker v. Howard*, 75 Wis. 415. An examination of those cases will show that no discrimination is made between legal and equitable actions as to the jurisdiction of the court. The rule is not inconsistent with the statute of frauds nor the principle that a written contract cannot be varied by parol; though statements to the contrary are sometimes found in the books, including some of the decisions of this court. It recognizes and gives effect to two very familiar elementary principles of evidence, namely, parol evidence may be resorted to to prevent the inequitable or fraudulent use of a written instrument; and, a written instrument, made in part execution of an entire verbal contract and covering some essential part of it, does not preclude showing the entire contract by a resort to parol evidence. In *Kent v. Agard*, *supra*, the only question presented was, Is a person confined to the remedy in equity to enforce his rights as mortgagor when such is the real relation between the parties but the written evidence does not disclose that fact? and the point was decided in the negative. (c) The last ground upon which the demurrer was properly overruled is that facts were alleged in the complaint showing with reasonable clearness that the deed and the contemporaneous transactions between the parties constitute a mortgage, and that the evidence of it is contained in the writings made by the parties. The written instrument given by Warner to the *Jordans* at the time the deed was executed, which is set forth in full in the complaint,

clearly shows the character of the deed. Some further reference will be made to the evidentiary character of that writing when we reach another branch of the case.

It does not require any particular form of words to make a mortgage. Mere form has very little to do with the matter. It is a contract whereby an interest in property is pledged as security, which creates the relation of mortgagor and mortgagee. If, in the execution of such a contract, a paper is made evidencing a part of it, and other papers be made at the same time evidencing other parts, all may be resorted to and all must be construed together if necessary in order to determine the real nature of the transaction. If any of the papers satisfies the essentials of the statute of frauds (sec. 2302, Stats. 1898) as to the necessity of every estate or interest in land created *inter partes* being created in writing, the other essentials may be shown, if not evidenced by such writings, either by other writings which form a part of the same transaction, or by parol evidence, as before indicated. Jones, Mortgages, § 60.

3. The court properly overruled the motion that plaintiffs be required to elect on which cause of action they would rely, for the very obvious reason that there was but one cause of action. The sole primary subject of the litigation was the alleged indebtedness of the estate to plaintiffs. The other matters presented for adjudication were mere incidents of and germane to the primary right which plaintiffs sought to vindicate.

4. It is sufficient to say, as to most of the rulings on evidence, that, right or wrong, they did not affect the final result, because the evidence to which they were directed clearly did not vary or materially add to the evidence received without objection. Under this head the ruling most relied upon as prejudicial error appears to be that which resulted in admitting the evidence of John Bottensek and some tabulated statements prepared by him, showing the

lands sold by Warner, the consideration received for each specific tract, as indicated by the records of deeds in the office of the register of deeds for Outagamie county, also showing the amount of tax claims acquired by Warner as to each tract of land, that information being gathered from the tax rolls for the years 1889 to 1894 inclusive. All the records from which the tabulated statements were compiled were before the court. The witness testified that he prepared the statements from a personal examination of the books and that he believed them to be true. Appellant's counsel had ample opportunity to cross-examine the witness and to inspect the books, and thereby test the credibility of the evidence. It can readily be seen that it was impracticable to produce and spread upon the record of the trial the history of each one of the large number of tracts of land to which the evidence referred. Respondents' counsel proceeded in that situation by a method well recognized as proper. Instead of reading in evidence the material portions of the numerous books containing the multitude of items, he produced the books and then gave from the mouth of a witness who had personally examined them a summary of the material facts, and put in, as part of such witness's evidence, tabulated statements thereof. The statements were not received as original evidence but as part of the witness's evidence. The rule which sustains that course is stated in Jones on Evidence at section 205, and is well supported by authorities, as follows: "Another relaxation of the rule based on the necessity of the case may be thus stated: Where the originals consist of numerous documents which cannot be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation."

It seems that the rulings on evidence not particularly referred to must be deemed immaterial, on the principle that such rulings, made in a case tried by the court, cannot affect the result on appeal unless it be made to appear that contrary rulings would or might probably have led to a different result below.

5. We think the finding, that the deed of November 11, 1884, in view of the accompanying transactions, was a mortgage, is well supported by the evidence. It is difficult to understand how any other conclusion could be reasonably arrived at. The transactions between the parties commenced by the creation of an indebtedness of $1,010.70, for which *Jordan* gave Warner his promissory note, depositing with him the tax certificates and redemption receipts mentioned in the writing of that date signed by Warner, which is set forth in full in the statement of facts. November 11, 1884, the amount due Warner was agreed upon between the parties at $2,746.03. If the deed then given was intended to be a satisfaction of the debt, the reasonable probabilities are that the consideration named in it would have corresponded with the indebtedness. That subsequent transactions were contemplated between the parties, on the theory that the $2,746.03 was to continue, after the execution and delivery of the deed, an indebtedness of *Jordan* to Warner, is evidenced by the writing then made, which is as clearly a part of one entire transaction between the parties as the deed. In such writing we find unmistakable evidence that the relations existing between the parties were those of mortgagor and mortgagee and of debtor and creditor. While it recites that Warner received a conveyance of certain lands, that is followed by this significant language: "Whereas I hold claims against said lands and other lands of said *Jordans* for taxes and tax deeds as charged in my book of account at this date against *W. D. Jordan's* lands, of $2,746.03," and that is followed by language to the effect that the lands

were to be sold on account of the indebtedness mentioned, and those remaining, after payment of the indebtedness of $2,746.03 and the expenses incurred by Warner in protecting the lands from tax claims, provided that should occur within five years, should be reconveyed to the *Jordans*. Now if the deed was given with intent to convey the legal title to the property to Warner, why the recital that he held tax claims thereon? They were all merged into the legal title if the deed was made as an absolute conveyance. The statement under Warner's hand that he held tax claims against the lands in the nature of indebtedness against *Jordan*, after receiving a conveyance of the property, is plainly inconsistent with any reasonable theory, except that adopted by the court below, that the relation of mortgagor and mortgagee was created November 11, 1884, and that it continued to the end. The limit of five years for the redemption of the lands, named in the writings, had no more effect on the right to redeem thereafter than the ordinary defeasance clause in a mortgage upon a default in the condition thereof which gives force to such clause. At the expiration of the five years, Warner had a right to demand payment of any balance then due him from *Jordan* and to institute proceedings to recover such balance at law or to enforce his mortgage in the ordinary way.

There are many other circumstances to which we might refer to support the decision of the lower court on the point above discussed; but we will not incumber the books with a long discussion of the evidence to give merited significance to them. There are many such circumstances plainly pointing to the conclusion which the trial court reached, but such conclusion is well and sufficiently supported by the writings alone, to which we have particularly referred. There is no doubt but that a conveyance, absolute in form, cannot be turned into a mortgage without clear and satisfactory evidence that it was so intended by the parties thereto; but the decision appealed from easily stands that test.

6. It is said that it was improper to charge the estate the amounts received by Warner on the sale of the lands held by him under the tax deeds. It is sufficient to say as to that, that the tax titles Warner obtained were all based on certificates which came to his possession while he was the mortgagee of respondents in respect to the lands covered by them. Tax deeds taken under such circumstances have no binding validity. They do not change the title to property covered by them in the slightest degree, if the owner thereof sees fit to enforce his rights. *Geisinger v. Beyl*, 71 Wis. 358; *Avery v. Judd*, 21 Wis. 262; *Morgan v. Hammett*, 34 Wis. 512. It should be further remarked that the evidence clearly shows that all the certificates upon which the tax deeds obtained by Warner were based were either included in the settlement of November 11, 1884, or were thereafter charged as debit items in *Jordan's* land account. They were either held as security by agreement with the *Jordans* or were taken up by Warner to protect his mortgage interest in the land. In either case the tax deeds were invalid.

Appellant's counsel, by one exception, complain because, in stating the account, the court gave respondents credit for the lands sold by Warner at the sale price instead of according to the entries made in the land account. It is considered that no injustice was done the estate by the manner the referee stated the account. He credited respondents with the sale price of the lands and charged them with all sums of money Warner paid out for tax claims thereon, and all of his legitimate expenditures in and about the business, in accordance with the writing of November 11, 1884.

There are a number of other alleged errors in the account as settled by the lower court, cited to our attention, which appear to be easily reconciled with the record without changing the final result, except one. With that exception we must rest the case with the assurance that each of the alleged

errors in the account has been carefully examined, and that it has been found that a correction of them where wrong, so as to make them conform exactly with the record, would not change the result. Most of them are evidently mere clerical errors made in preparing the findings from the minutes which the referee had before him. Quite a number of mistakes were made in descriptions of land, but the amounts credited to respondents in the aggregate are correct, with the one exception mentioned. All the errors in the account would undoubtedly have been promptly cured in the court below if attention had been called to them in such a way as to have brought them definitely to the attention of the circuit judge. They might properly be discarded here because of the omnibus character of the exception to the finding. A general exception to a finding covering a large number of matters correctly found with a few not so found is not sufficient to require the court to review an assignment of error as to the erroneous items, any more than is a general exception to several specific findings of fact where some of them are correctly found. However, the appellant has not been prejudiced in this case by the want of care indicated in making the exceptions.

There is a charge of $150 as the sale price for the northwest quarter of the northwest quarter, section 20, 23, 16, the same description being charged in connection with another account. Counsel for respondents is not able to furnish any explanation of that error. It is suggested that it may not have been carried forward into the final result, but it seems that the presumption is rather the other way. It is quite clear that the principal of the indebtedness of the estate as found by the referee is erroneous by $150. We have not the benefit of the referee's interest computations, but we have stated the account with considerable care, including interest items, though we have omitted them from the opinion, and that seems to demonstrate that the apparent

error of $150 is one in fact and that the judgment should be modified accordingly. The modification, in order to include a correction of an erroneous addition of interest which necessarily followed the erroneous addition of $150 of principal, is $198.35.

Objection is made because the referee refused to allow the estate credit for the services of Warner in selling the land. The decision in that regard is justified by the finding of fact supported by the evidence that the greater part of the lands were wrongfully sold. They were sold without the knowledge or consent of the *Jordans*. Obviously, if a trustee be guilty of a breach of trust, he cannot charge his *cestui que trust* for services rendered in the course of committing the breach.

7. Sec. 1692, Stats. 1898, which requires the plea of usury to be supported by proof of a tender of the principal of the debt as a condition of relief from the usurious contract, and the rule that usury, to be available, must be pleaded, are fully satisfied by the fact that the usurious contract in question was set forth in the complaint, which clearly shows the invalidity as to interest, and the further fact that the principal of the indebtedness was fully paid by the *Jordans* by credits they received or were entitled to from the sale of their lands, long before the commencement of this action.

Nothing further need be said. The judgment of the circuit court must be modified by deducting $198.35, and affirmed as modified, and the costs of respondents recoverable in this court must be limited to clerk's fees.

By the Court.— So ordered.

CASSODAY, C. J., took no part.

CARPENTER, Administrator, Respondent, vs. THE TOWN OF ROLLING, Appellant. 107 559 112 *417

September 25 — October 12, 1900.

Highways: Pleadings: Negative pregnant: Death: Traveled track: Court and jury: Proximate cause: Verdict: Notice, by whom signed, when sufficient: Widow: Pecuniary loss: Evidence: Instructions to jury: Intoxication: Contributory negligence.

1. In an action against a town to recover for the death of plaintiff's intestate, the complaint alleged that the road where the accident occurred was a public highway. The answer, while admitting the existence of a wagon road at the place in question, alleged want of sufficient knowledge or information to form a belief as to whether the road was a legally laid out highway, or whether the defendant was in duty bound to keep it in repair, and therefore denied the same. *Held*, insufficient to raise an issue as to whether the *locus in quo* was a public highway. Towns should be held to know what roads within their limits are public highways.
2. Whether a large log lying at right angles with the traveled track, one end being within a few inches of such track, constitutes a defect in the highway is a question for the jury, even though there was at that point a smooth road about ten feet in width.
3. In an action to recover for the death of plaintiff's intestate, alleged to have been caused by a defective highway, it appeared, among other things, that deceased, a strong, healthy man, thirty-eight years of age, was found dead on the highway with his face smashed in, evidently the result of a fall from his wagon; that there was considerable blood upon the highway and upon his face; that deceased had been traveling in his wagon south over the road in question; that about forty-eight feet north of where the body was found there was a large log lying nearly at right angles to the track, one end being within a few inches of the east track: that about eight inches from the end of the log there was a fresh mark, apparently of a wagon wheel, with a wagon track leading to it from the north; and that the team and wagon of deceased were found about forty-five rods south, standing by the side of the road. *Held*, that the questions whether deceased was thrown from his wagon by reason of its striking the log, and whether his death resulted from the injuries received in his fall, were for the jury.
4. Under sec. 1339, Stats. 1898 (requiring a notice in writing, signed by the party, his agent or attorney, to be given to a supervisor of the

town), notice of a claim against a town for damages for the death of a person occasioned by a defective highway need not be signed by the administrator of the deceased, but may be given by the beneficiary to whom the damages will accrue in case of recovery. *Parish v. Eden*, 62 Wis. 272, followed. [Whether such notice is necessary in case of an action for death under secs. 4255, 4256, not determined.]

5. The notice required by said sec. 1339, Stats. 1898, may be given by the delivery of a duplicate original.

6. On an issue as to the pecuniary loss of a widow, caused by the death of her husband, it appeared, among other things, that deceased was a strong, healthy man, thirty-eight years of age; that he owned 160 acres of land, fifteen acres of which were cleared, and that therefrom he supported his wife and three children; that with her help he raised during the year before his death about 300 bushels of grain, 100 bushels of potatoes, half an acre of corn, and some hay; that she did all the work after his death, but did not raise quite as much as when he was alive. *Held*, sufficient to authorize the submission of the question to the jury, in view of the difficulty of proving exact values in such cases.

7. In view of the fact that the liability for accidents upon highways is purely statutory, and that the statute creating it (sec. 1339, Stats. 1898) provides for recovery in case of damage caused by "the insufficiency or want of repairs" of any bridge or road, it is better, in submitting to the jury the question of liability, to use the statutory terms, rather than to attempt to use other expressions that may be substantially equivalent.

8. In an action to recover for the death of a man who had been thrown from his wagon and killed while driving home from town on a load of feed, the evidence — stated in the opinion — is *held* insufficient to sustain findings of the jury that he was not intoxicated, and that he was capable of exercising ordinary care.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action for damages on account of the death of Jacob Hetzel, the plaintiff's intestate, which death is alleged to have resulted by reason of a defect in the highway in the defendant town. The evidence showed that Jacob Hetzel at the time of his death was a farmer thirty-eight years of age, living in the town of Aniwa, Shawano county,

about two and one-half miles from the village of Aniwa, and several miles south of the city of Antigo, in Langlade county. He was a married man, having a wife and three children. On the 18th day of November, 1897, Hetzel left home in the morning with his farm wagon and a team of horses to take a load of rye to the mill at Antigo for the purpose of having it ground into feed. He reached Antigo with his load, and had the feed ground, and started back with the feed upon his wagon in bags at about four o'clock p. m. on the same day. While in town he visited several saloons, and on his way home had some difficulties in keeping his team in the road, and was thrown or fell from his wagon while driving upon a piece of traveled road in the defendant town, which is claimed by the plaintiff to have been a highway, at some time between six and seven o'clock in the evening. He was found lying upon the road, dead, with his face badly bruised, at about eight o'clock p. m., and his team and wagon were found some forty-five rods south from the body, standing by the fence. The evidence showed that the body of the deceased was lying about forty-eight feet south of a large log, the end of which came up close to the east track of the road on which he was traveling, and it is claimed by the plaintiff that the wagon of the deceased struck the end of the log and threw him out. There was considerable evidence upon both sides as to whether or not the deceased was intoxicated, but, as that subject will be treated at length in the opinion, it is unnecessary to state it here. A special verdict was returned, as follows: "(1) Was Jacob Hetzel killed by falling from his wagon at or near the time and place described in the complaint? Yes. (2) Was the death of Jacob Hetzel caused by the defective and unsafe condition of the highway at the time and place in question? Yes. (3) Was the defective and unsafe condition of said highway at the time and place in question the proximate cause of Jacob Hetzel's death? Yes. (4) Had such defective and unsafe condition

of the highway existed for such a length of time prior to the accident that, in the exercise of ordinary care and prudence, the defendant would have known of it and repaired the same? Yes. (5) Was Jacob Hetzel at the time of the accident guilty of any want of ordinary care and prudence which contributed to the accident which caused his death? No. (6) Was Jacob Hetzel so intoxicated at the time of the accident as to be incapable of exercising ordinary care in the management of his team to avoid injury? No. (7) If you answer the last question, Yes, then answer this question: Did such intoxication contribute to the injury he received? (8) At what sum do you assess the plaintiff's damages? $1,500."

Judgment for the plaintiff was rendered upon this verdict, and the defendant appealed.

T. W. Hogan, for the appellant.

For the respondent there was a brief by *Bump, Kreutzer & Rosenberry*, and oral argument by *E. L. Bump.*

WINSLOW, J. A number of assignments of error were made by appellant which are not considered well taken, and these will be first considered.

1. It is said that the *locus in quo* was not shown to be a highway. The road in question was shown to have been first opened by private parties, but it was also shown that it had been in existence and generally used by the public for twelve or thirteen years, and, further, that several taxpayers had been permitted by the overseer of highways to work out their road taxes at various times upon it. We do not think, however, that the question was an open one, under the pleadings. The complaint alleges that the road where the accident occurred was a public highway in the defendant town. The answer admits that there is and was a wagon road in said town at the place claimed, which is used by the public for travel by teams and by travelers on

foot, but as to whether it is a legally laid out road or highway, or whether said town is in duty bound to keep the same in repair, defendant has not sufficient knowledge or information to form a belief, and therefore denies the same. This is a style of pleading not to be commended. The town should, in reason, be held to know what roads are public highways within its limits. The allegation that the road in question was a public highway is not met either by positive denial or denial upon information and belief, as the statute requires. Stats. 1898, sec. 2655. Taken altogether, the allegations amount to an admission that the road was generally used by the public, but that the town officers had no knowledge or information as to whether it was legally laid out, or as to whether the town was bound to keep it in repair. The question whether it was legally laid out was not the essential question, but rather whether it was a highway in fact. It might have become a highway by dedication and use by the public, though never formally laid out, and the allegation in the complaint that it was in fact a public highway is nowhere denied, but rather admitted by the negative pregnant statement of want of knowledge as to whether it was ever legally laid out. *Althouse v. Jamestown*, 91 Wis. 46.

2. It is argued that no defect in the highway was shown, because there was shown to be a smooth road a little over ten feet in width at the point of the accident. This position is untenable, because it is well settled that, notwithstanding a road may contain a smooth traveled track of sufficient width, still, if there is an obstruction or declivity so close to the traveled track as to render the road unsafe for those traveling thereon in the exercise of ordinary care, the highway may be insufficient. *Slivitski v. Wien*, 93 Wis. 462, and cases cited. The question whether the log in this case was such an obstruction was properly for the jury.

3. It is claimed that there was no sufficient evidence to

justify a finding that the deceased was thrown from the wagon by reason of its striking the log, and that, even if that be admitted, still that it is mere conjecture whether his death resulted from the injuries received in his fall. We think there was sufficient evidence justifying the submission of both questions to the jury. The log was a large hemlock log, lying nearly at right angles with the traveled track, and with its end sharpened off, and within a few inches of the east wagon track. It had become somewhat soft and "dozy" on the outside, and a number of the witnesses who were at the place immediately after the accident found a fresh mark or notch on the north side of the log, and about eight inches from the end, which seemed to have been just made by the wheel of a wagon striking it, and one witness testified that there was a wagon track leading from the north to the point where the log was apparently struck. While these facts are not conclusive, we think they are sufficient to entitle the plaintiff to have the question submitted to the jury. As to the second contention, namely, that the cause of death is conjectural merely, the evidence showed that the plaintiff was a strong, healthy, hard-working man, of the age of thirty-eight years, not afflicted with any disease; that he was found on the highway, dead, with his face smashed in, as the result evidently of a severe fall from his wagon; and with considerable blood upon the highway and upon his face. Certainly the jury were warranted in finding that his death, under such circumstances, was the result of the fall. Any other finding would be pure conjecture.

4. It is claimed that no proper notice was given to the town, under the provisions of sec. 1339, Stats. 1898, because a copy only was given to one of the supervisors, whereas the statute requires the original notice to be served, and because the notice was signed, "Matilda Hetzel, by B. A. Cady, Her Attorney," and was not signed by the administrator who brings the action. Conceding that such a notice is necessary

in case of an action for death, under secs. 4255, 4256, Stats. 1898 (a point not decided), we think the objections are hypercritical. The statute (sec. 1339) requires a notice in writing, signed by the party, his agent or attorney, to be given to a supervisor of the town. The attorney testifies that he delivered a copy to the supervisor, and obtained his admission of service on the original, and that the notices were duplicates. If the notices were duplicates, then both were manifestly originals, thus satisfying the statute, even if the narrow construction claimed by the appellant be given to it. As to the claim that the notice must be signed by the administrator, and cannot be given by the beneficiary to whom the damages will accrue in case of recovery, the case of *Parish v. Eden*, 62 Wis. 272, distinctly holds that the notice in such case may be given by the beneficiary, and the case in that respect was in no way affected by the holding in the case of *McKeague v. Green Bay*, 106 Wis. 577.

5. It is objected that the evidence was not sufficient to show any pecuniary loss to the widow. We think this objection not well taken. The evidence of the widow showed, in substance, that the deceased was a strong, healthy man, thirty-eight years of age; that he owned and lived upon 160 acres of land, fifteen acres of which were cleared and cultivated; that he supported his wife and three children by his labor on the farm; that he left a team of horses, two cows, and two heifers; that he raised during the year before his death about 300 bushels of grain, 100 bushels of potatoes, half an acre of corn, and some hay; that she helped her husband some in making hay and during harvest time; that she had done all the work herself since her husband's death, and during the last year raised forty-five bushels of grain, some hay, potatoes and corn, but not quite as much as when her husband was alive. While it would have been more satisfactory if the money value of the earnings of the deceased which he contributed to the support of his wife had been

more definitely fixed, it must be remembered that the difficulties in the way of proving exact amounts or values in the case of a small farmer, much of whose produce is never reduced to money at all, but is consumed in specie, are very great. On the whole, we think the evidence was fairly sufficient to authorize submission of the question to the jury.

6. It is insisted that the verdict is improper in form, and does not cover all the issues in the case, and that the following questions submitted by the defendant should have been incorporated in the verdict: "(1) Was Jacob Hetzel, at the time he was killed, intoxicated from drinking spirituous, malt, or intoxicating liquors? (2) Was the road a public highway, which the defendant was bound to keep in repair? (3) Was the road in such a condition that a person using ordinary care and prudence could safely drive over the same without striking log described in complaint?" As to the second of these questions, it has already been held in this opinion that the answer must be construed as admitting the existence of the highway, and as to the other questions we think they were, in effect, covered by the questions actually submitted. A criticism is made of the form of the questions with regard to the condition of the highway which has a certain degree of force. The statute creating liability for accidents upon highways (sec. 1339, Stats. 1898) provides for a recovery in case of damage caused by "the insufficiency or want of repairs" of any bridge or road. Both in the special verdict and the charge of the court in this case the question submitted to the jury is whether the highway was "defective and unsafe." While we are not prepared to say that this expression is not substantially equivalent to the expression "insufficient" or "out of repair," we should think it better if the statutory terms were used, especially in view of the fact that the liability is purely statutory.

Passing, without specific mention, a number of minor as-

signments of error which are not considered as well taken, we come to the question whether the findings of the jury to the effect that the deceased was not guilty of contributory negligence, and was not intoxicated so as to incapacitate him from exercising ordinary care, are sustained by the evidence. The principal litigated question of fact in the case was whether the deceased was intoxicated at the time of the accident. Upon this issue the plaintiff produced several witnesses who saw the deceased while he was in Antigo, between three and four o'clock in the afternoon, who testified that he was, in their judgment, not intoxicated; and one witness, who claims to have met him on his way home and talked with him, testified to the same effect. Opposed to this testimony, there is uncontradicted testimony that he drank whisky and beer in several saloons in Antigo during the afternoon; and that after leaving Antigo with his load, at somewhere near four o'clock in the afternoon, he stopped at a roadside saloon, just outside of the city. The uncontradicted evidence as to his actions on his way home, from the time he left the city until his death, is simply overwhelming in its tendency to prove maudlin intoxication. The witnesses are all apparently disinterested and reputable citizens, some of them neighbors and friends of the deceased, and their testimony is entirely consistent and apparently truthful. Without detailing the testimony given by each witness, it is sufficient to say that their testimony shows the following facts: Hetzel left Antigo with his wagon full of feed, in bags, at some time after four o'clock. Before he got out of the city his load became disarranged, and one of the bags of feed began to spill its contents along the road. The witness Hopkins overtook him, stopped him, and helped him straighten up his load, and scraped a part of the lost feed in a bag. Hopkins then got into the wagon with him, and rode to his (Hopkins's) residence, a distance of about sixty rods. Hopkins testified

that the man was intoxicated. While Hopkins and Hetzel were scraping up the feed, the witness Zahn, a farmer living four miles south of Antigo on the road which Hetzel traveled in going home, came by with his team and lumber wagon, and stopped. He testifies that Hetzel was drunk, not able to hold himself straight; that he held onto the wagon with one hand, and picked up feed with the other. Zahn further testifies that he went along home, and Hetzel followed. After he reached home, and had put up his team, he heard a man hollering in the road, and got a lantern, and went to see what was the matter. He found Hetzel standing on the ground, holding onto his wagon, with his team two rods out of the road. One line was in his hands, and the other dragging on the ground and under the end of the wagon tongue. He wanted witness to help straighten him up and get him in the road, which the witness did. He (witness) had to balance him into the wagon, and before Hetzel had gone four or five rods he was nearly out of the road again. He was drunk. Two ladies, who had been at Zahn's with a horse and buggy, were also witnesses of this transaction, and were about driving south, but allowed Hetzel to precede them on the road. One of the ladies testifies that he drove on about a mile, to the place of one O'Connor, where they found him with the horses turned up to the fence, and he said, "Boys, stop a little;" but they drove on. She further testifies that she thought the man was vomiting. The ladies drove back over the road soon after, and found one of Hetzel's bags of feed, which had dropped from the wagon on the road. O'Connor testifies that he heard a call for help, and went out, and found a team standing in the road, and a man asked him if Shroeder lived here, and he told him, "No," and he (O'Connor) directed the man to Shroeder's house, and took the horses' heads, and helped him get back into the road, because he seemed to have difficulty about it. About two

miles south of Zahn's place the witness Barnes lives, and he testifies that as Hetzel came by the team started to turn in and ran up on the embankment on the side of the road, but that Hetzel hallooed at them, and they turned back, and went across on the other side, and then back into the road, and then started off on a run. From this point to the place of the accident no one seems to have seen him, but a number of witnesses heard the noise of his team and wagon, as if driven furiously. A few rods before reaching the log he lost another bag of feed; then his cap and a mitten. After he was thrown out, the horses proceeded about forty-five rods, and stopped in the fence, the bridle of one of the horses being off. When Hetzel was picked up, the witnesses almost unanimously testify that he smelled strongly of liquor. Comment on these uncontradicted facts is unnecessary. They prove conclusively that the man was in a state of almost helpless intoxication, and incapable of exercising any care. Any other conclusion almost amounts to an insult to the intelligence, and a verdict that he was not intoxicated, or that he was capable of exercising ordinary care, should have been set aside at once.

By the Court.— Judgment reversed, and action remanded for a new trial.

CASSODAY, C. J., took no part.

EBERT, Appellant, vs. LANGLADE COUNTY and others, Respondents.

September 26 — October 12, 1900.

Claim for relief of transient poor: Reimbursement of town by county: Construction of statutes: Equity: Suit by taxpayer.

1. Under sec. 1512, Stats. 1898 (providing for the temporary relief by towns, cities, and villages of poor persons not having a legal settlement therein, and making the expenses so incurred a charge

against the county, provided notice is given as therein specified), the town, city, or village is primarily liable for the relief, and the county is liable to reimburse it upon its complying with the conditions precedent named in the section.

2. L., a poor person without means of procuring medical treatment, and having no legal settlement in the defendant county, became suddenly in need of treatment while residing in one of its towns. The chairman of said town gave the prescribed notice, brought L. to the county seat, and employed a physician to render medical treatment to L., under an agreement that the physician should file his claim therefor with the county clerk, to be paid by the county. The amount charged for the services was reasonable and the claim was audited by the county board. Thereupon plaintiff brought an action as a taxpayer, suing in behalf of himself and all other persons similarly situated, to enjoin the issuing of a county order on such audited claim. *Held*, that the claimant had no legal or equitable demand enforceable against the county. The claim should have been presented to and audited by the auditing board of the town and paid out of the town treasury like any other town liability, and a claim should then have been presented by the town to the county for reimbursement.

3. Although the county, in such case, was not legally liable for the claim, yet, as it was reasonable in amount, and, if it had taken its proper course, would ultimately have reached the county as a legal claim and would have been paid at precisely the amount allowed, a court of equity will not interfere at the suit of a taxpayer.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Equitable action by a taxpayer, suing in behalf of himself and all other persons similarly situated, to enjoin defendant county from issuing a county order on an audited bill for medical services rendered a poor person, on the ground that the claimant was not entitled to recover his claim of the county.

The cause was tried by the court and facts were found as follows: Louis Leduchi, a poor person without means of procuring medical treatment, and having no legal settlement in *Langlade County*, became suddenly in need of such treatment while residing in the town of Vilas in said county.

The chairman of the town of Vilas, pursuant to sec. 1512, Stats. 1898, notified the county clerk of the county, February 9, 1898, and within ten days after the condition of Leduchi became known to him, that said Leduchi was sick and helpless and wholly without means to take care of himself and that he had no legal settlement in said town of Vilas. Said chairman of the town of Vilas conveyed Leduchi to the city of Antigo at the time notice was served on the county clerk as aforesaid, at which time he, as chairman of the town of Vilas, and the county clerk as such, employed *M. J. Lower*, one of the defendants, to render medical treatment to said Leduchi, and agreed that he should file his claim for services with such county clerk, to be paid by said county. The claim in question was filed pursuant to such agreement. The amount charged for said services is reasonable. The board of supervisors of said county, prior to the allowance of the bill in question, allowed bills for board and lodging for said Leduchi upon the ground of his being a public charge.

Upon such facts the court decided, as matter of law, that *Lower's* claim was a proper county charge, and that the allowance thereof by the county board was proper because the county board accepted said Leduchi as a county pauper. Judgment was rendered accordingly and plaintiff appealed.

For the appellant there was a brief by *Finucane & Conway*, and oral argument by *F. J. Finucane.*

For the respondents there was a brief signed by *T. W. Hogan*, attorney for *Langlade County* and *Hayssen*, county clerk, and *Max Hoffman*, attorney for *Lower*, and oral argument by *Mr. Hogan.*

MARSHALL, J. There can be no doubt but that the town of Vilas was primarily liable for the relief of Leduchi under sec. 1512, Stats. 1898, and that the county was liable to reimburse the town upon its complying with the conditions precedent named in such section, which reads as follows: "When any person not having a legal settlement therein

shall be taken sick, lame or otherwise disabled in any town, city or village or for any other cause shall be in need of relief as a poor person and shall not have money or property to pay his board, maintenance, attendance and medical aid, the supervisors or other proper authorities shall provide such assistance to such person as they may deem just and necessary, and if he shall die they shall give him a decent burial. They shall make such allowance for such board, maintenance, nursing, medical aid and burial expenses as they shall deem just and order the same to be paid out of the town, city or village treasury. The expenses so incurred shall be a charge against the county, the account [of the town] therefor shall be audited by the county board and paid out of the county treasury. . . . It shall be the duty of the authorities within ten days after such person so becomes a public charge in their town, city or village to notify the county clerk of such fact, and thereupon the county authorities may take charge of such poor person and remove him to the county poor farm or relieve him in such other manner as they may see fit." Now, while there is a finding that the claimant was employed to render medical aid to Leduchi, by the county clerk and the chairman of the board of supervisors of the town of Vilas acting together, there is no evidence to that effect, nor any to show that the county clerk had authority to represent the county in such matters. The undisputed evidence is that Leduchi was a subject for immediate relief by the town of Vilas under sec. 1512; that the chairman of the board of supervisors of the town employed the claimant to render such relief; that notice to the county was given in order to render it liable to reimburse the town; and that the county did not exercise its right to take charge of Leduchi and relieve him independent of the town. It follows that the town became the debtor of the claimant; that he did not have any legal or equitable demand enforceable against the

county, and that it had no legal right to allow or pay his claim. The claim should have been presented to and audited by the auditing board of the town of Vilas and paid out of the town treasury like any other town liability, and a claim should then have been presented by the town to *Langlade County* for reimbursement.

Notwithstanding what has been said, it does not necessarily follow that plaintiff could successfully appeal to a court of equity to enforce the legal right of the county, and performance of the duty of its proper officers, to reject the physician's claim. A taxpayer can successfully invoke the power of a court of equity to enforce a right of a public corporation when there is danger that such corporation will otherwise suffer some substantial injury which to some extent will affect the taxpayer. The power of taxpayers, in such an emergency, to set judicial machinery in motion, is a very valuable right, but it must be kept within those reasonable limits which govern the administration of justice in courts of equity. The wrong existing or threatened must be one that will or may, if not properly met, cause some substantial loss to the corporation, else there is no warrant for calling the equity power of the court into activity.

Applying the foregoing to the facts of this case, it is clear that the judgment appealed from is right. No equity was shown by the evidence, entitling plaintiff to maintain the action. While it is true that the claim of the physician for attending Leduchi was an indebtedness of the town of Vilas primarily, the county was ultimately liable therefor. The claim appears to have been reasonable in amount. It would, if it had taken its proper course, ultimately have reached the county as a legal claim and been paid precisely at the same amount as that allowed by the county, direct to the physician.

The result of this case by no means justifies such conduct as the action was designed to prevent. It was clearly

wrong. The statutes should be strictly followed at every step in incurring public liabilities and in the disbursement of public moneys; but equity will not lend its aid to prevent or remedy violations of duty in that regard unless such violations will or may result in some substantial loss to the public as a whole.

By the Court.—The judgment is affirmed.

CASSODAY, C. J., took no part.

COMMERCIAL NATIONAL BANK OF APPLETON, WISCONSIN, Appellant, vs. SMITH, imp., Respondent.

September 26 — October 12, 1900.

Bills and notes: Indorsement: Guaranty: Statute of frauds: New and independent consideration: Incidental benefits.

1. Under subd. 2, sec. 2307, Stats. 1898, providing that a special promise to answer for the debt of another shall be void unless in writing, subscribed by the promisor, and expressing the consideration, an indorsement on a promissory note, "I hereby guaranty the payment of the within note," signed by the guarantor, is void because it fails to express any consideration. *Taylor v. Pratt*, 3 Wis. 674, and *Parry v. Spikes*, 49 Wis. 384, followed.
2. R. and S., respectively the payee and guarantor of a note, were stockholders in a corporation in which R. held a controlling amount of stock. S. purchased some of R.'s stock on his own account, and G., the maker of the note, purchased the remainder, neither having any interest in the shares of the other. In payment G. gave the note in suit, indorsed by S., but the indorsement failed to show any consideration. *Held*, that the incidental benefit, if any, which might accrue to S. by having R. out, and G. in, as a stockholder of the corporation, did not amount to a new and independent consideration passing between newly contracting parties, and independent of the original contract, so as to take the guaranty out of the statute of frauds (subd. 2, sec. 2307, Stats. 1898).

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This action was brought to recover on a promissory note for $1,000 executed by the defendant Goodrick to one Rowell, and by him sold to the plaintiff. The defendant *Smith* was made a party, as having signed a guaranty on the back of the note, as follows: "I hereby guaranty the payment of the within note. *A. L. Smith.*" Goodrick defaulted. *Smith* answered in abatement that Rowell was a joint owner of the note with plaintiff, and asked that he be made a party. He admitted signing the guaranty as alleged, but set forth that it was a special promise to answer for the debt of another. A jury was waived. On the trial the defendant *Smith* objected to any evidence under the complaint, on the ground that it failed to state a cause of action. The objection was overruled. After some evidence had been taken, the plaintiff asked leave to file an amended complaint, to which the defendant entered a similar objection. After argument the court sustained the objection and granted judgment for the defendant. The amended complaint, after setting out the execution and delivery of the note with the guaranty, alleged, in substance, that the omission to state a consideration in the guaranty was an oversight, and that *Smith* did in fact receive a valuable consideration for the execution of said guaranty, which is claimed to rest upon the following facts: *Smith* and Rowell were stockholders in a corporation, the latter owning a controlling interest and dictating its policy, which was not satisfactory to *Smith.* He, with the defendant Goodrick, proposed to buy out Rowell's interest; he to retire, and Goodrick to take his place. Rowell was to sell *Smith* 170 shares, and to Goodrick 470 shares, which would give them the control of the corporation. Goodrick was to give five notes of $1,000 each, and Rowell declined to take said notes unless three of them were guaranteed by *Smith,* which he consented to, and signed the guar-

anty on the note in suit. There was a further allegation that Goodrick made a written pledge of his stock to a trustee to secure the payment of these notes. The plaintiff has appealed from the judgment dismissing the complaint as against *Smith.*

For the appellant there were briefs by *E. G. Jones* and *J. C. Kerwin*, and oral argument by *Mr. Kerwin.* They contended, *inter alia*, that the amended complaint stated a good cause of action against the defendant *Smith. Dyer v. Gibson*, 16 Wis. 557; *Sears v. Loy*, 19 Wis. 96; *Shook v. Vanmater*, 22 Wis. 532; *Cunningham v. Brictson*, 101 Wis. 384; *Hall v. Wood*, 3 Pin. 308; *Hewett v. Currier*, 63 Wis. 386; *Young v. French*, 35 Wis. 111; *Wyman v. Goodrich*, 26 Wis. 21; *Houghton v. Ely*, 26 Wis. 181; *Twohy M. Co. v. Ryan D. Co.* 94 Wis. 319; *Griswold v. Wright*, 61 Wis. 195; *Osborne v. Farmers' L. & T. Co.* 16 Wis. 35; *Clapp v. Webb*, 52 Wis. 638; *Vogel v. Melms*, 31 Wis. 306; *Leonard v. Vredenberg*, 8 Johns. 29; *Mallory v. Gillett*, 21 N. Y. 417; *Burr v. Mazer*, 2 Pa. Super. Ct. 436, 39 Weekly Notes Cases, 157; *Grant v. Diebold S. & L. Co.* 77 Wis. 72; *Morgan v. South Milwaukee L. V. Co.* 97 Wis. 278; *Hoile v. Bailey*, 58 Wis. 434; *Larson v. Cook*, 85 Wis. 564; *Putney v. Farnham*, 27 Wis. 187; *Gauger v. Pautz*, 45 Wis. 449; *Remington v. Palmer*, 62 N. Y. 31; *Cady v. Shepard*, 12 Wis. 639; *King v. Ritchie*, 18 Wis. 554; *Davis v. Barron*, 13 Wis. 227; *Luqueer v. Prosser*, 1 Hill, 256; *Gorman v. Ketchum*, 33 Wis. 427; *Hough v. Gray*, 19 Wend. 202.

Lyman E. Barnes, for the respondent.

BARDEEN, J. On its face the guaranty was confessedly bad, under subd. 2, sec. 2307, Stats. 1898, because it failed to express any consideration. It was so held early in the history of this state, and the rule so announced has never been departed from. *Taylor v. Pratt*, 3 Wis. 674. In a later case (*Parry v. Spikes*, 49 Wis. 384) the question was again

reviewed, and the conclusion in *Taylor v. Pratt* was affirmed; the court holding that a written guaranty upon a promissory note, though referring to the note, and made at the time with it, and constituting a ground of the credit to the maker, is void, by the statute of frauds, if it fails to express the consideration. These cases are conclusive against the plaintiff unless the facts attempted to be set out in the amended complaint are sufficient to take the case out of the operation of the statute. The plaintiff bases its contention upon *Dyer v. Gibson*, 16 Wis. 557, and subsequent cases, wherein it is held that the promise of one person, though in form to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promisee to the promisor, and beneficial to the latter, is not within the statute of frauds, and need not be in writing subscribed by him and expressing the consideration. The difficulty we find with the plaintiff's case is that, admitting all the facts alleged to be true, they do not bring this case within the rule above stated. *Smith* purchased some of Rowell's stock on his own account. Goodrick purchased the remainder on his own account. Goodrick had no interest in *Smith's* stock. *Smith* had no interest in Goodrick's stock. Rowell parted with nothing, and *Smith* received nothing to make him Rowell's debtor. The incidental benefit, if any, which might accrue to *Smith* by having Rowell out, and Goodrick in, as a stockholder of the corporation, will not take the case out of the statute. *Clapp v. Webb*, 52 Wis. 638. In this case it is said: "Under repeated decisions of this court, the alleged promise is within the statute of frauds unless it was founded upon a new and independent consideration passing between the newly contracting parties, and independent of the original contract. . . . We are not aware of the existence of any rule of law which authorizes the inference that, merely because the promisor may be incidentally benefited by his promise, his object in mak-

ing it, and the consideration therefor, is such incidental benefit." A careful reading of the amended complaint fails to disclose any fact or circumstance sufficient to charge *Smith* as a guarantor, under the rule of the cases mentioned.

By the Court.—The judgment of the circuit court is affirmed.

CASSODAY, C. J., took no part.

MISSINSKIE, Respondent, vs. MCMURDO, Appellant.

September 26 — October 12, 1900.

Debtor and creditor: Fraudulent conveyances: Sales of chattels: Consideration: Change of possession: Instructions to jury: Burden of proof: Special verdict.

1. Whether a bill of sale was fraudulent as to creditors of the vendor being at issue, it is *held* upon the evidence that the court should have submitted to the jury in the special verdict, in some form, the question whether a sufficient consideration passed between the parties to the transaction. Absence of a finding upon that point rendered the special verdict incomplete.
2. Under sec. 2310, Stats. 1898 (providing that transfers of chattels shall be presumed to be fraudulent unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession), the delivery and possession contemplated is not such a technical delivery as would give validity, *inter partes*, to a contract of sale, under sec. 2308, but such a delivery and change of possession that those familiar with the situation would naturally draw the inference of a change of ownership.
3. Thus, under said sec. 2310, it was error to instruct the jury that if plaintiff, who claimed a threshing machine under a bill of sale from his brother, alleged to have been made in fraud of creditors, hired his brother to continue to run the machine, and the brother acted as the servant or agent of the plaintiff, then the jury should find the "real possession" was in the plaintiff. Such instruction is diametrically opposed to the statute.

4. Judgment having been rendered against plaintiff's brother. a threshing machine in the debtor's possession was seized on execution issued on such judgment. Plaintiff replevied the machine, claiming title under a bill of sale from his brother, but the transaction between plaintiff and his brother had not been accompanied by an immediate delivery of the machine, followed by an actual and continued change of possession. *Held* that, under sec. 2310, Stats. 1898, the presumption of fraud as against creditors arose, and that the burden of proof rested on the plaintiff to remove that presumption.
5. Relationship between the parties to a bill of sale, while not necessarily a badge of fraud, is properly to be considered as a circumstance in deciding whether the transaction was in good faith or with a hidden purpose of defrauding creditors of the grantor.
6. Where one of the questions of a special verdict was whether the plaintiff ought to have known that the transactions whereby he obtained title to the goods of a debtor were for the purpose of preventing the debtor's creditors from or delaying them in collecting their claims, a requested instruction to the effect that a sale is void where the object of the debtor is to hinder and delay, if made to one having knowledge of the intent, and that such knowledge need not be actual, but will be inferred from facts and circumstances sufficient to raise a suspicion, or put him on inquiry, informs the jury of the legal effect of their answer to a portion of the special verdict, and its refusal is not error.
7. It is not error to refuse to instruct the jury that, if a purchaser of chattels knew the seller was largely indebted and pressed by creditors, then it was his duty to see that the purchase price was applied to the seller's debts; no such duty rests on the purchaser unless, by reason of other facts, he is chargeable with complicity in a fraud which would avoid the purchase.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

One Frank Missinskie, being considerably indebted, and especially indebted upon a judgment for damages in favor of one Shay, transferred to his brother, the plaintiff, a well driller, thresher, and an engine used for running the same, by written bill of sale, on November 24, 1894, remaining in practical control and operation thereof as agent for *Phillip*, as is now claimed. The consideration testified to by plaint-

iff and Frank was the satisfaction of an existing indebtedness of $450 owing plaintiff by Frank, and the payment of $600 in money at the time of the delivery of the bill of sale. Frank had substantially no other property. The evidence was conflicting as to the extent of plaintiff's knowledge of Frank's condition, the application of the $600 by Frank to certain of his creditors was in dispute, and generally the *bona fides* of both Frank and *Phillip* was controverted on the trial of this action. The defendant, as sheriff, levied an execution in favor of said Shay's judgment upon the threshing machine so transferred, and *Phillip* brought replevin.

The jury, by a special verdict, found the following facts: (1) Plaintiff, at the time of the bill of sale, knew that Shay had a judgment against Frank. (2) The bill of sale was not made for the purpose of preventing the creditors of Frank Missinskie from collecting any claims against him or delaying collection thereof. (3) Plaintiff did not know that Frank was indebted and pressed by his creditors. (4) Plaintiff ought not to have known that the bill of sale was made by Frank for the purpose of preventing his creditors from collecting claims against him or delaying the collection thereof. (5) Frank Missinskie did not continue in possession of the property after the same was made and down to the time of the levy by defendant. (6) Frank did not use and control the property for his own benefit and profit after the bill of sale the same as he did before.

Judgment was rendered in favor of the plaintiff for the possession of the property and for $100 damages resulting from deprivation of the use thereof. The defendant appealed.

J. C. Kerwin, for the appellant.

For the respondent there was a brief signed by *A. M. Spencer*, and oral argument by *John Bottensek*.

DODGE, J. The first error assigned is the refusal of the trial court to submit questions requested by the defendant

as to whether or not Frank was indebted to the plaintiff at the time of the bill of sale in the sum of $450, and also whether or not $600 was paid at the time of the execution of the bill of sale. The court failed to submit to the jury in any way the question whether any consideration passed between the parties to that transfer. We are satisfied that error was thus committed. Without deciding whether the exact questions requested by the defendant ought to have been answered, it is obvious that the question of an actual and substantial consideration was one of the issuable facts. The plaintiff, in effect, affirmed it by claiming ownership under the bill of sale. The defendant in terms denied that there was any consideration therefor.

It is urged by the respondent that there was no conflict of testimony on this question. Suffice it to say that while both the plaintiff and his brother Frank testify categorically to the existence and cancellation of the $450 debt, and to payment of the $600, the cross-examination threw both of them into conflict with probabilities, and Frank into direct conflict with a disinterested witness, when he attempted to account for the disposition of the moneys so paid. As has often been said, fraud can seldom be proved by direct evidence. Its perpetrators work in the shadow and secretly, and, of course, by their own testimony deny it. In the majority of cases it must be ascertained from circumstances, from the manner of the parties, and by inference from such facts as the opposite party can lay before the jury. Enough of suspicious circumstances surrounded this whole transaction to have justified the jury in disbelieving the testimony of the interested parties, even as to the existence of the consideration claimed, and the court should have submitted either the questions asked or some other questions sufficient to dispose of the controversy as to consideration. Failure so to do, especially when his attention was called to the subject, was error. Absence of any finding on the subject

renders the verdict incomplete and insufficient to support judgment for plaintiff. *Bell v. Shafer*, 58 Wis. 223; *Dugal v. Chippewa Falls*, 101 Wis. 533, 537; *Bigelow v. Danielson*, 102 Wis. 470; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307.

The second assignment assails the instructions given with reference to the change of possession. They are at some length, and need not be set forth *in extenso*. The court himself decided and declared that no actual physical change of possession took place, but nevertheless submitted to the jury the fifth and sixth interrogatories of the special verdict, and instructed them, in substance, that it was not a question of actual physical possession, which was conceded to have been retained by Frank Missinskie, but involved the question as to the "real possession," saying: "The explanation of it as given by the plaintiff is that he did not want to run the machine himself, and that he therefore hired his brother to take charge of it and run it in that way. If that is true, the possession remained in the plaintiff. If you find from the testimony that Frank Missinskie was working for his brother during this period of time I have mentioned here, and that, while he was in actual manual possession of the property, yet he was only acting as the servant or agent of his brother, then the possession was in the plaintiff, and you should answer the question, No; that the possession was not, while it was actually and apparently in the possession of Frank, yet, as I say, if you find that he was only acting as the servant and agent of *Phillip*, then the legal possession was *Phillip's*, and you should answer the question, No." This instruction is diametrically opposed to the rule over and over again laid down by this court, and indeed by substantially all courts, in applying the requirements of sec. 2310, Stats. 1898, providing that transfers shall be presumed fraudulent "unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing sold." The delivery and possession contem-

plated by this statute is not that technical delivery which gives validity *inter partes* to a contract of sale, in compliance with sec. 2308, but is such a delivery and change of possession that those familiar with the situation would naturally draw the inference of a change of ownership. The purpose of sec. 2310 is to require that parties who transfer property shall accompany the transfer by the public *indicia* of such change, and that if such *indicia* are absent they must be prepared to establish the *bona fides* of the transaction. *Manufacturers' Bank v. Rugee*, 59 Wis. 221, 226; *Schneider v. Kraby*, 97 Wis. 519.

In this connection, while not pointed out as an error, and therefore not ground of reversal, we think it well to call attention to the form of the fifth question, which renders it practically double and misleading to the jury. The query is whether Frank Missinskie continued in possession of the property "after the same [bill of sale] was made, and *down to the time of the levy by defendant.*" This was a period of something over three years, and it was apparent in evidence that during the last six or eight months of this period the machine in question, the thresher, had not been in use, and therefore had been left by Frank at the farm of a neighbor, so that it was not in his manual possession. The jury might well have understood that they were to answer this question, No, although the machine had remained in Frank's possession after the sale, and down to the period when, by reason of change of seasons, he had stored it on the farm of another. If this form of question were used, it should have been carefully guarded by explanation that his possession continued while the machine was so stored.

The appellant further assigns as error under his second classification the instruction given with reference to the second question of the special verdict, to the effect that as to that question and all other questions "the burden of proof is upon the defendant. The person who alleges fraud must

prove it. He must prove it, too, by reasonably clear and satisfactory evidence. So, as I say, the burden of proof rests upon the defendant. If you are in doubt as to the second question or any of these questions, you should resolve the doubt in favor of the negative." Apart from detail criticisms (*Rindskopf v. Myers*, 87 Wis. 85) which might be made of this instruction, the whole general theory is wrong. The court had already declared, as above pointed out, that there had been no actual physical change of possession of this property, but had left the jury to decide whether there had been or not. If sec. 2310, Stats. 1898, had not been complied with in that respect, the burden of proof, certainly as to the second question, was upon the plaintiff. That section is too clear to leave doubt or to justify discussion. If the transfer is not accompanied by an immediate delivery, and followed by an actual and continued change of possession, the presumption of fraud as against creditors arises, and the burden of proof rests upon the transferee to remove that presumption, which he can only accomplish by proving the good faith and honesty of the transaction. The whole scope and theory of the instruction being erroneous, its details may be passed without comment. Refusal of requested instructions to the converse of the rule laid down by the circuit court is also assigned as error, and for the reasons above stated must be held such.

The third error is assigned upon the refusal of the court to give to the jury certain instructions requested by the defendant; among others, an instruction to the general effect that relationship, while not necessarily a badge of fraud, was properly to be considered as a circumstance in deciding whether the transaction between the parties was in good faith or with a hidden purpose of defrauding creditors of the grantor. Inasmuch as reversal must follow the errors hereinbefore pointed out, we need not decide as to the absolute accuracy of the instructions requested. They are sub-

stantially an expression of the rule of law laid down by this court in *Bleiler v. Moore*, 88 Wis. 438, and that rule was a proper one to be given to the jury.

Further error is assigned upon refusal of the court to give to the jury the fourteenth instruction requested, to the effect that a sale is void where the object of the debtor is to hinder and delay if made to one having knowledge of such intent, and that such knowledge need not be actual, but will be inferred from facts and circumstances sufficient to raise a suspicion or put him upon inquiry. No error was committed in the refusal of this instruction, for it is obnoxious to the rule that it informs the jury of the legal effect of their answer to a portion of the special verdict. Further than this, we observe that the court gave the substance of the instruction as to constructive knowledge or notice of the grantor's intent in his instruction to the jury with reference to the fourth question. That instruction was, at least, sufficiently favorable to the defendant upon this subject, so that whether it may have been sufficiently guarded to protect the plaintiff's rights need not be considered. *Bleiler v. Moore*, 94 Wis. 385.

Again, error is asserted upon the refusal to give the eighteenth and nineteenth instructions requested, to the effect that the indebtedness from Frank to *Phillip* in the sum of $450 would not make the sale *bona fide* and valid, unless the plaintiff saw that the $600 cash was applied to pay the creditors of Frank Missinskie; and (19) "if you find that *Phillip Missinskie* knew when he took the bill of sale that Frank Missinskie was largely indebted and pressed by his creditors, then it was the duty of *Phillip* to have the $600 balance of purchase price applied to the payment of Frank's debts then owing from Frank to his creditors." Neither of these instructions so requested is so strictly accurate that error could be predicated upon their refusal. Nevertheless ideas are embodied therein which, in certain aspects of the case,

should be communicated to the jury as bearing perhaps on the second question,— that as to the intent. The authority cited for the duty of a purchaser to see to it that the purchase price paid is applied to the creditors of the grantor is *Avery v. Johann*, 27 Wis. 246. The duty was there said to exist as to a son who the court found received a conveyance from his father as a volunteer purchaser, and not as a creditor seeking to collect his claim, and with knowledge that the conveyance was made with intent to defraud the father's creditors. It has often been held that a mere volunteer, who is at liberty to purchase or not as he sees fit, will not be protected in exercising that option in favor of purchase where he knows or should know that the transferrer's intent is fraudulent as against his creditors, and if he so purchases he will be held to have so voluntarily aided the fraudulent purpose of his grantor as to participate therein, and, so participating, can escape the effect of that fraud in avoiding his conveyance only by seeing to it that the proceeds which he places in the grantor's hands are honestly applied to satisfy creditors from whom the transferred property is withdrawn. This is the extent to which the rule has been carried. No duty of seeing to the application of proceeds rests upon the purchaser, unless, by reason of other facts, he is chargeable with complicity in a fraud which would avoid his purchase. It is a method of escape from results which would otherwise fall upon him, and not a duty which the purchaser ordinarily owes. Bump, Fraudulent Conveyances, § 189. It will be seen that this condition is omitted from each of the instructions in question, the condition specified in the nineteenth being merely that the purchaser, *Phillip*, had knowledge that Frank was largely indebted and pressed by creditors. Knowledge of the financial condition of the person from whom one purchases is not knowledge of the fraudulent intent, though it may be evidence, more or less cogent, from which knowledge of that intent may be inferred, or a

duty to investigate arise, so that knowledge will be imputed in case of failure to so investigate. The instruction as requested would usurp the function of the jury, and compel them to treat as conclusive certain facts which are only persuasive and evidentiary. *Rindskopf v. Myers*, 87 Wis. 84.

The final assignment of error to the refusal of the court to direct a verdict for the defendant cannot be sustained. The case made by the evidence was one about which reasonable minds might well differ, and was therefore properly for the jury.

By the Court.—Judgment reversed, and cause remanded for a new trial.

CASSODAY, C. J., took no part.

ADKINS, Appellant, vs. LOUCKS and others, Respondents.

September 26 — October 12, 1900.

Attachment, when lies: Liability of heirs for debts of ancestor: Appeal: Order, when reviewable: Judgments: Fraudulent conveyances: Parties: Joinder of causes of action: Foreign guardian: Sale of ward's realty in Wisconsin: Limitation of actions: Nonresidents.

1. The provisional remedy for the attachment of property under the statutes of this state is confined to actions at law to recover money due from the defendant upon contract.
2. An action to enforce the statutory liability of heirs for the debts of their decedent to the extent of property inherited by them from him is not an action on contract.
3. An order vacating an attachment of property is not reviewable on appeal from the judgment in the action. It must be reviewed on appeal from the order setting aside the attachment.
4. Save cases where interlocutory judgments are allowable under the special provision in sec. 2883, Stats. 1898, but one final judgment is permissible in any action. In that the rights of all the parties must be adjudicated.

5. If a person convey property in fraud of others who are entitled to resort to it for the collection of their claims, and the vendee retain part of the consideration and part of it be paid to and retained by a third person as trustee for the vendor, and both be guilty participants in the fraud, all are proper parties defendant in an action to enforce the right of such person to a satisfaction of his debt out of the property conveyed.
6. The test of whether more than one cause of action is stated in a complaint is whether more than one principal subject of action or primary right is presented by the pleading for adjudication.
7. In an action to enforce the right of a creditor to payment of his claim against the estate of a deceased person out of the property of such person in the hands of his heirs under sec. 3274, Stats. 1898, a fraudulent vendee of such property is a proper defendant, and likewise is a third person who participated in the fraud and is in possession of the fruits thereof for the vendor.
8. In the circumstances last above stated, the only primary right for adjudication is the right of the plaintiff to payment of his claim out of the specific property. The other matters are incidental and germane to such primary right. They do not constitute another or other causes of action.
9. If a person, possessed of property as heir of another, sell the same with intent to prevent the creditors of the estate of his decedent from resorting thereto for the payment of his claim under sec. 3274, Stats. 1898, and the vendee participate in such purpose, the sale is not protected by sec. 3285, but is voidable under sec. 2320.
10. A foreign guardian has no greater authority over the estate of his ward in this state, after filing a certified copy of his appointment in the probate court, than a general guardian appointed by a court in this state. He cannot sell the real estate of his ward here situated under his general authority, but must obtain special authorization therefor as provided by law in case of other guardians, and a sale otherwise made will not affect the title attempted to be transferred.
11. If when a cause of action accrues in favor of a resident of this state against a nonresident thereof, the latter be out of the state, the statute of limitations upon the enforcement of such cause of action here will not run against the former while the latter remains so absent.

[Syllabus by MARSHALL, J.]

APPEALS from judgments of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action to enforce the liability of heirs under sec. 3274, Stats. 1898. The action was commenced May 25, 1897, against *Dolly M.*, *Martha M.*, *William H.*, and *Myrtle Loucks*, minor heirs, and *Wallace E.*, *Stephen P.*, and *Kate Rose Loucks*, adult heirs, of Phineas Loucks, deceased. The complaint set forth in substance the following facts: April 1, 1874, Phineas Loucks made a promissory note and delivered it to plaintiff, promising to pay plaintiff or bearer $338.71 one day after date with interest at the rate of ten per cent. per annum. April 4, 1876, he paid $63.33, May 22, 1877, $300, and October 28, 1890, $50. There is due the principal of the note and interest from its date at the rate mentioned therein, less the payments acknowledged. Phineas Loucks removed to California in 1877, and thereafter remained absent from this state till he died in 1891. He left no heirs except the defendants, his children, to whom his property in this state descended at his death. He then owned, in Outagamie county, this state, an undivided one-half interest or more in the N. E. ¼ of the S. E. ¼ of section 18, town 32, range 18 E., worth about $600. He left no other property in this state. No administration has been granted in this state. There are no means by which plaintiff can collect his claim except by resorting to the land aforesaid and the statutory liability of the heirs under sec. 3274, Stats. 1898. Judgment was asked for, making plaintiff's claim a lien upon the land.

On an affidavit stating the same facts as those above set forth, and containing no allegation of indebtedness of the defendants to plaintiff, a writ of attachment was sued out, under which the interests of defendants in the land mentioned were seized. January 5, 1898, defendant answered, pleading the six-years statute of limitations, and putting in issue substantially all the allegations of the complaint except that in regard to Loucks's removal to California and his death in 1891, his leaving the land in Wisconsin, its de-

scent to defendants as his heirs, and that he left no other property in this state. The writ of attachment was set aside as unauthorized by law and unsupported by proper affidavit.

July 22, 1897, defendants were permitted to serve a supplemental answer to the effect that subsequent to the commencement of the action and before the filing of any notice thereof, they alienated the land mentioned for value and in good faith to *Louis Jacquot*, who was a *bona fide* purchaser thereof. Thereafter plaintiff was permitted to file a supplemental complaint and to bring in, as defendants, *Humphrey Pierce*, the guardian *ad litem* of the minor defendants and attorney for the defendants, *Louis Jacquot*, the alleged purchaser of the land, and *John Hurst*. The supplemental complaint charged, in effect, in addition to the allegations contained in the original complaint, that the heirs of Phineas Loucks in bad faith attempted to convey their interests in the land to *Jacquot* and that he conveyed the interest he thereby obtained to defendant *Hurst;* that the entire consideration for the land, which was to move to the heirs, had not been paid; that such part as had been paid was in the possession of defendant *Pierce;* that each and all of the parties had knowledge of and participated in the purpose of divesting said heirs of the title to the property, and that such purpose was to place the land and the proceeds thereof beyond the reach of plaintiff and prevent the collection of his claim. It was further charged that the validity of the title of *Hurst*, as to the interest in the land which he claimed to have obtained through *Jacquot*, was dependent upon whether a foreign guardian, without any authorization from a court of this state, can by his deed pass title to real estate of his ward there situated. The pleading set out in detail the history of the formation of the scheme of conveying the land to *Jacquot*, and his conveying the same to *Hurst*, and alleged with particularity that the purpose thereof was to defraud plaintiff, and that such purpose was participated in by each and all of the added defendants.

Defendant *Pierce* interposed a general demurrer to the complaint, and also demurred upon the ground that several causes of action were improperly united. Defendants *Hurst* and *Jacquot* joined in a like demurrer. The demurrers were sustained. A judgment was rendered dismissing the complaint as to *Pierce*, with costs in his favor, and a like judgment was rendered in favor of defendants *Hurst* and *Jacquot*.

The allegations of the complaint, aside from the new matter brought in in relation to the alienation of the property to *Jacquot*, were established by the evidence. Plaintiff objected to evidence offered by defendants as to the *bona fides* of the alienation of the property to *Jacquot* because the action had been dismissed as to him, leaving no issue as to the good faith of the alienation that could be effectually tried. The objection was overruled. Evidence was given that a fair consideration for the land was paid by *Jacquot*. Plaintiff did not offer any evidence on the issues presented by the supplemental complaint.

The findings were as follows:

The allegations of the complaint, independent of the new matter brought in by supplemental complaint, are true.

January 24, 1898, the adult heirs, in good faith and for value, alienated their interest in the real estate sought to be charged, to *Louis Jacquot*.

W. H. Hurst was appointed general guardian of the minor defendants by a court of competent jurisdiction in California, and was authorized by such court to sell the interest of such minors in the land in question. He made a sale thereof to *Jacquot* pursuant to such authority and conveyed the property accordingly, the same being made in good faith and for a fair consideration.

This action was commenced more than six years after the cause of action accrued.

Notice of the pendency of the action was duly filed April 26, 1898.

Upon such findings the court decided that plaintiff was guilty of laches to the prejudice of defendants, and that they were entitled to judgment dismissing the complaint with costs.

Separate appeals were taken by plaintiff from the judgments.

John Bottensek, for the appellant.

For the respondents there was a brief signed *Humphrey Pierce*, attorney for defendants *Loucks*, and *Henry D. Ryan*, attorney for defendants *Hurst*, *Jacquot*, and *Pierce*, and oral argument by *Mr. Pierce*.

MARSHALL, J. The attachment was properly discharged. The provisional remedy for the seizure of the defendant's property prior to a judgment against him is confined to cases where the cause of action sought to be enforced is for a debt due from the defendant on contract. The cause of action here is for the recovery of a debt due from the deceased, Phineas Loucks, primarily out of property which his heirs inherited. They are not liable in excess of such property, or liable at all upon contract. Moreover, this is an equitable action requiring an accounting, and an attachment is not allowable in such an action. Further, an order granting or refusing a provisional remedy must be reviewed, if at all, on direct appeal from the order. It does not affect the merits of the action, nor the judgment, so as to render it reviewable under sec. 3070, Stats. 1898. While an attachment must have an action pending to support it, the two are distinct remedies, and if the former be vacated or otherwise disposed of before being involved in the final relief granted, the review on appeal must be confined to the special right of appeal given by subd. 3, sec. 3069, Stats. 1898. Any other right of appeal in such circumstances is obviously valueless. If a writ of attachment is set aside, the attachment plaintiff, if he deem himself aggrieved, should proceed

promptly to appeal under sec. 3069, Stats. 1898, and take the proper proceedings to continue the attachment in the meantime. Drake, Attachment, § 428*a*.

The judgment in favor of respondent *Pierce* and that in favor of respondents *Hurst* and *Jacquot* are irregular and wholly unauthorized. Defendants in an action can have but one final judgment, though that may award them several relief against the plaintiff, or between themselves, with this exception: in an action incidentally involving an accounting or some particular issue of fact or condition requisite to a full determination of the rights of the parties, where there is a finding which, notwithstanding such circumstance, substantially disposes of the controversy between the parties, an interlocutory judgment may be rendered. Sec. 2883, Stat. 1898. The rendition of a judgment in advance of the final disposition of the case, as was done here, has been many times condemned. *Sellers v. Union L. Co.* 36 Wis. 398; *Scott v. Reese*, 38 Wis. 636; *Gage v. Allen*, 84 Wis. 323, 330. The Code only authorizes a judgment, finally disposing of the rights of all the parties, with the exception heretofore referred to. An action may properly be dismissed as to a defendant, but whatever relief he obtains in the nature of a final judgment must be embodied in the judgment rendered, which finally closes up the entire controversy presented to the court for adjudication by the pleadings. By reference to the cases cited, it will be seen that the law has been settled so long, as indicated, that there is little need for any one to go astray.

The judgment in favor of *Pierce* and that in favor of *Hurst* and *Jacquot* being out of the way, we reach the question of whether the demurrers were properly sustained. We are not definitely informed by anything in the record, or the briefs of counsel, or by anything said on the oral argument, what the grounds of the court's decision were or the extent of it, whether it was grounded on the theory that

several causes of action are improperly united in the complaint or the theory that the complaint does not state a cause of action against either of the demurring defendants, or whether it was grounded on both theories.

There is certainly but one cause of action stated in the complaint. The sole primary right presented for enforcement was that of the plaintiff, under sec. 3274, Stats. 1898, and subsequent sections, to the value of the real estate which came to the heirs of Phineas Loucks by inheritance, so far as necessary to satisfy his debt. The infallible test, by which to determine whether a complaint states more than one cause of action, is, Does it present more than one subject of action or primary right for adjudication? *Gager v. Marsden*, 101 Wis. 598. If it stand that test, no matter how many incidental matters may be connected with the primary right, rendering other parties than the main defendant proper or necessary to the litigation for a complete settlement of the controversy as to plaintiff, or for the due protection of their rights as against him or between themselves, there is yet but one cause of action, and a demurrer upon the ground of the improper joinder of causes of action will not lie.

The sole subject of the action stated in the complaint being to recover plaintiff's claim out of the land that descended to the Loucks heirs, the setting aside of fraudulent conveyances from such heirs or their grantees to others, which interfere with the accomplishment of that end, is germane to that subject, and, necessarily, the claimants of the property under such conveyances are proper if not necessary parties to the litigation. Without their presence before the court the final judgment would be valueless.

Again, since it is the value of land that the action seeks to reach, if *Pierce*, *Hurst*, and *Jacquot* conspired together with the Loucks heirs to prevent that being accomplished, and either is in possession of any of the fruits of the fraud, he is as much a trustee thereof for the plaintiff as the holder of

the legal title to the land who participated in the fraud. So if the land cannot be reached, because it has passed into the hands of a *bona fide* holder, but the proceeds of the sale of the property are in the hands of a guilty participant in the fraud, a trust is impressed thereon for the benefit of plaintiff, and the enforcement thereof is germane to the primary purpose of the action. It follows that each of the defendants *Pierce*, *Hurst*, and *Jacquot* was properly brought into the case, and that the relief sought is germane to the main purpose of the litigation.

It will be readily seen, not only that there is but one cause of action stated in the complaint, but that it reaches each of the demurring defendants. The Loucks heirs had no absolute right to sell their interest in the real estate as against plaintiff. They were privileged to free the property from plaintiff's right to a specific lien thereon, by the alienation thereof in good faith prior to the filing in the proper office of the notice of the pendency of the action, and not otherwise. That is governed by sec. 3285, Stats. 1898, which reads as follows: "No real estate descended to any heir or devised to any devisee, which shall have been alienated in good faith and for value by him before a notice of the pendency of the action was filed or, if no such notice be filed, before the final judgment is docketed in the county, shall be liable to execution on any such judgment or any way affected thereby." That is, prior to the filing of a notice of *lis pendens*, as indicated in the section, the Loucks heirs had the same right to part with their title to the real estate as their ancestor would have had if living. If they parted with such title under such circumstances as to taint the transaction with fraud and render it voidable on that account under sec. 2320, Stats. 1898, then their conveyance or conveyances were void at the election of plaintiff. But, necessarily, such election could not be made effectual to avoid the transfers

without the fraudulent vendee or vendees being brought into the litigation. So the complaint is not only free from the infirmity charged, of improperly uniting two causes of action, but the general demurrer thereto was not well taken.

We now come to this question: "Did the effort of the Loucks heirs to divest themselves of title to the property accomplish their purpose? As to the adult heirs the answer must be in the affirmative. The title passed to the grantee. Whether a voidable title passed or not depends upon whether the allegations in the supplemental complaint, to the effect that the transfer was not made in good faith, are true. The mere fact that this action was pending when the transfers were made is not sufficient to impeach the transaction for fraud. To accomplish that, it must be shown that there was an intent on the part of the vendors of the property, participated in by the vendees, to hinder, delay, or defraud the plaintiff. If the purpose was to turn the property into money and remove it from the state, and thereby create such a condition as to prevent plaintiff from collecting his claim, then the transaction is evidently tainted with bad faith within the meaning of the statute.

As to the minor heirs, the question of whether their interest in the property passed to *Jacquot* by their guardian's deed, depends upon whether a foreign guardian can pass the title to lands of his ward situated in this state without first obtaining authority so to do from the courts here. That must be answered in the negative. It seems that the learned circuit court decided to the contrary on the authority of the note to § 804 of Gary's Probate Law (2d ed.). The text is as follows: "A domiciliary foreign guardian of a nonresident ward who has no guardian appointed in Wisconsin, upon filing his original appointment or a duly authenticated copy in any county court of Wisconsin, is invested with all the powers and rights in relation to the ward's property in

Wisconsin of a guardian duly appointed in the state," citing sec. 4281, Stats. 1898. Such text states the power conferred by the section with substantial accuracy. The language is somewhat inaccurate in confining the section to "*domiciliary foreign guardians.*" No such idea is found in the section. It refers to foreign guardians generally, regardless of where domiciled. The note referred to is as follows: "This extraordinary statute gives the absolute control of a nonresident's property in the state, without the supervisory control of any court of the state, to the guardian." If that means that the section vests in the foreign guardian the right to sell his ward's real estate without permission of or supervision by the state court, or otherwise dispose of the proceeds of a sale of such property, nothing could be further from the truth. The text writer, in preparing his note, may not have intended that such an interpretation should be put upon it as the one adopted by the circuit judge in this case, though it would easily bear such interpretation. Perhaps it should be stated stronger, like this,—that the language will hardly bear any other interpretation. It is unfortunate that such an erroneous view of the statute (we cannot call it construction, because the statute is too plain to admit of interpretation or construction) should have found a place in a text-book so frequently resorted to as Gary's Probate Law, especially by young practitioners. Sec. 4281 gives to foreign guardians, under the conditions stated therein, the same power to sell the real property of their wards situated in this state as guardians appointed by the state court possess. The latter, merely under their general powers, cannot sell or convey their ward's real estate. They can only do so by procuring special authority for that purpose from the court, as provided in ch. 151, Stats. 1898. No such authority was obtained by the guardian of the minor defendants, hence his attempt to dispose of their property did not affect the title

thereto. It remained in such minors after such attempt the same as before.

The court decided as a matter of law that appellant's claim was barred by laches. We cannot discover any finding of fact to support that view. There is no finding of fact touching the subject of laches. There is a finding that plaintiff's cause of action was more than six years old before this action was commenced, but that was made, obviously, because of the plea of the statute of limitations. It does not touch the subject of limitation by mere laches in the absence of a finding, and evidence to support it, that the appellant had knowledge of his rights, or reasonable means of knowing thereof, and that in such situation he unnecessarily delayed the enforcement of his claim against the property of the Loucks heirs, to their prejudice. There is no reason for saying that he was barred by laches. The evidence shows that up to the time this action was commenced, it was not known, except by circumstances, that Phineas Loucks was dead. He disappeared in 1891, since which time no one had seen or heard from him. Appellant resided at a great distance from where Phineas Loucks resided and where he disappeared. He commenced this action very soon after the death of Loucks could be established by the legal presumption arising from the circumstance of his disappearance and that no one had seen or heard from him. Before such an important conclusion of law should have been made as that the plaintiff was barred by laches from the prosecution of his claim, some finding of fact should have been made to base it on. It seems that the conclusion is clearly erroneous.

The plea of the statute of limitations upon the enforcement by action of a liability created by law, cannot avail the defendants, because the heirs were out of the state when the plaintiff's cause of action arose, and so continued. That

prevented the limitation statute from running in their favor. Sec. 4231, Stats. 1898.

By the Court.— The judgments are reversed, and the cause remanded for a new trial.

CASSODAY, C. J., took no part.

As to participation by purchaser in fraud of vendor which will invalidate transfer for good consideration as against vendor's creditors, see note to *Kansas M. P. Co. v. Sherman* (3 Okla. 204), in 32 L. R. A. 33.— REP.

MUELLER, Respondent, vs. TOWN OF CAVOUR, Appellant.

September 26 — October 12, 1900.

Taxation: Towns: Population: Statutes: Construction: Amendments: Limit on taxation: Town orders: Interest.

1. Sec. 776, S. & B. Ann. Stats., provided that the electors at any annual town meeting should have power to raise money for town purposes, subject to the limitation as to the amount of highway taxes provided in sec. 1240. Ch. 293, Laws of 1895, amended sec. 776 by striking out the limitation referring to sec. 1240, and inserting a provision that the total tax levied for any one year should not exceed three per cent. of the assessed valuation of the taxable property of the town. Ch. 385, Laws of 1895, provided that the amount of highway taxes to be assessed in any town for any one year should remain as provided by said sec. 1240. *Held*, that the limitations of sec. 1240 remained unaffected by the change in sec. 776.
2. Sec. 1240, Stats. 1898, provides that the supervisors shall assess not less than one nor more than seven mills on the dollar on the valuation of taxable property of the town, for highway purposes, and any additional amount, not exceeding fifteen mills on the dollar of such valuation, which shall be ordered at the next preceding annual town meeting, but that no town containing a population of less than 500 shall levy or collect in any one year a highway tax of more than $1,000, and that no town having two or more congressional townships shall levy or collect a tax, exclusive of the

mill tax thereinbefore authorized, of more than $2,000 in any one year. *Held*, that a town containing less than 500 inhabitants had no power to levy or collect a highway tax of more than $1,000 in any one year, though such town contained two congressional townships; and that warrants for work done on the highways, issued after that sum had been expended, were void.

3. Town orders do not bear interest unless the electors of the town, by vote taken pursuant to the authority of ch. 325, Laws of 1899, so declare.

APPEAL from a judgment of the circuit court for Forest county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action upon 176 town orders. The facts were stipulated, and were, in substance, as follows: On the 7th of April, 1896, and for some years prior thereto, the town of Pelican Lake, Forest county, was a duly organized town, containing less than 500 inhabitants, and having a territory of more than two congressional townships. At the annual town meeting of said town held April 7, 1896, the electors voted a highway tax of $1,000, and in form voted to authorize the town board of supervisors to levy a tax for highway purposes, in addition to said $1,000, of fifteen mills upon the dollar upon the assessed valuation of the town. Thereafter the town board of supervisors in form levied an additional highway tax of nine mills upon the dollar, making a total sum of $4,330 of highway taxes levied and collected in the town for that year. During that year work was done upon the highways, and town orders issued therefor amounting in all to $4,331.63. Among the orders so issued were a part of the 176 orders sued on in this action, which were duly assigned to the plaintiff before the commencement of this action. A part of the highway orders held by plaintiff and sued on in this action were issued for work done before the sum of $1,000 had been expended upon the highway and a part afterwards. On the 26th day of September, 1896, the plaintiff presented the orders for payment to the town treasurer, and payment was refused.

On the 21st day of April, 1897, the town of Pelican Lake was dissolved by virtue of ch. 278, Laws of 1897, and the town of *Cavour* was created, comprising most of the territory of the town of Pelican Lake, and succeeding to all of the rights and liabilities of said town of Pelican Lake. On the 10th of June, 1897, the plaintiff filed his claim in the office of the town clerk of the town of *Cavour* for presentation to the board of audit, but ten of the orders sued upon in this action were not included in said claim. It was stipulated that all the orders were valid except the highway orders issued after $1,000 had been expended and those which had never been presented to the board of audit.

Upon these facts, trial by jury was waived, and the court held that all the orders were valid except the ten orders which had not been presented to the board of audit, and allowed interest to be recovered at the legal rate from the time of such presentation to the board of audit. From judgment in accordance with these findings, the defendant town appealed.

For the appellant there was a brief by *Greene, Fairchild, North & Parker*, and oral argument by *J. R. North.*

For the respondent the cause was submitted on the brief of *H. B. Schwin.*

WINSLOW, J. The amount which the town of Pelican Lake could legally spend for highway purposes during the year was limited to the amount which it could legally raise for that purpose by taxation. *Webster v. Douglas Co.* 102 Wis. 181; sec. 823, S. & B. Ann. Stats. So the question upon which the case must turn is whether the town was authorized to levy more than $1,000 tax for highway purposes in the year 1896. The claim of appellant is that because the town contained less than 500 inhabitants it could only raise a highway tax of $1,000, while the respondent's contention is that because the town contained a territory of

more than two congressional townships it could raise by taxation for highways $2,000 and seven mills on the dollar of its assessed valuation of property. The question is one of construction of the various statutes bearing on the subject, and these statutes will now be examined.

Prior to the passage of ch. 293, Laws of 1895, the material statutory provisions on the subject were as follows: Sec. 776, S. & B. Ann. Stats., provided, among other things, that the electors, at the annual town meeting, should have power "to vote to raise money for the repair of roads and bridges or either; for the support of the poor and for the defraying of all other proper charges and expenses of the town, subject, however, to the limitation as to the amount of highway taxes provided in section twelve hundred and forty." Sec. 1240 of the same statute provided, in substance, that the supervisors should assess a poll tax for highway purposes on every adult male inhabitant, with certain exceptions, and proceeded as follows: "The residue of the highway tax, to an amount of not less than one nor more than seven mills on the dollar, shall be assessed on the valuation of real and personal property in each district, but the supervisors in the several towns of this state shall assess any amount of highway tax, additional to the amount above authorized, which shall be ordered to be assessed at the next preceding annual town meeting, not exceeding fifteen mills on the dollar of such valuation. But no town containing a population of less than 500 inhabitants shall hereafter levy or collect in any one year a highway tax of more than $1,000, including the amount of money that may be voted at any special or general town meeting and the mill tax herein authorized to be levied by the supervisors. And no town having two congressional townships or more, shall levy or collect a tax exclusive of the mill tax hereinbefore authorized, for more than $2,000 in any one year."

Thus, it appears that the limitations provided in sec. 1240

were by express words imported into sec. 776, and, so far as applicable, were as much a part of the last-named section as if written out at length therein. One of these limitations was a sweeping limitation that "no town" containing less than 500 inhabitants should have power to levy or collect a highway tax of more than $1,000 in any one year.

While the law stood thus, it is difficult to see how it could be claimed that the $1,000 limitation did not apply to every town in the state continuing less than 500 inhabitants, just as its plain terms indicate, and regardless of the question of extent of territory. It is true that there was a subsequent limitation to the effect that no town having two or more congressional townships should levy a highway tax exclusive of the mill tax of more than $2,000 in any one year, but this was an entirely independent provision. It was not in the form of a proviso or exception to the previous limitation. A little reflection makes its object manifest. In a town containing great territory, and consequently a very large amount of assessable property, owned perhaps by nonresidents, but also containing only a few more than 500 inhabitants, a highway tax of fifteen mills would raise an excessive amount, and consequently an additional limitation, not, however, so drastic as the previous limitation upon towns of less than 500 inhabitants, was necessary, and this additional or cumulative limitation was provided for such towns. This seems clearly to be the true meaning and intent of the provisions above noted, and such was practically the construction placed upon them in the case of *C. N. Nelson Lumber Co. v. Loraine* (C. C.), 24 Fed. Rep. 456. The case of *Sage v. Fifield*, 68 Wis. 546, is cited as opposed to this construction, but the question now being considered was not raised or decided in that case. There was no question there involved as to the powers of a town containing less than 500 inhabitants. But even conceding this to be the proper construction of the laws as they stood prior to 1895, it is claimed that the $1,000

limitation was, in effect, removed by the passage of ch. 293 of the laws of that year. This last-named chapter amended sec. 776, above named, by striking out all after the word "town," and inserting instead the words, "provided, however, that the total taxes levied in any town in this state for any one year for all purposes including taxes for schools whether under the district or township system . . . shall not exceed three per centum of the total assessed valuation of such town. . . ." Thus the direct reiteration of the limitations in sec. 1240 was eliminated from sec. 776, but there was no attempt there nor since to repeal or materially change the provisions of sec. 1240. The last-named section was and is the section intended to govern the whole subject of highway taxes in towns. It was and is a law directed to this particular subject, and, under familiar principles, must control general legislation, even in cases of apparent conflict. But there was no conflict. The legislature evidently desired to place a limitation upon the power of taxation by a town for all purposes, and the natural place to insert it was manifestly in the body of sec. 776. To place the general limitation at the end of the section in addition to the highway limitation would be clumsy, to say the least, and, such last-named limitation being specially provided elsewhere, it was deemed unnecessary to retain it here. But, if any further argument were needed to show that the intent of the legislature was not to repeal or affect the limitations of sec. 1240, it would be found in ch. 385, Laws of 1895, approved on the same day as ch. 293, in which it is enacted, that "the amount of highway taxes that may be assessed in any town for any one year and the manner of making such assessment shall remain the same as now provided for by sec. 1240, R. S., and the amendments thereto. . . ." The conclusion is inevitable that the limitations of sec. 1240 remain unaffected by the change in sec. 776, and therefore that the town of Pelican Lake, being a town of less than 500 inhabitants, could

raise no more than $1,000 for highway purposes in the year 1896. The town orders, therefore, which were issued after that sum had been expended were void.

Interest was allowed by the trial court on all orders from the time of the filing of the plaintiff's claim with the town clerk. This was error. It is a general principle of law that town orders do not bear interest, in the absence of statute to that effect. *Bigelow v. Washburn*, 98 Wis. 553. It is provided by statute that county orders shall bear no interest. Sec. 686, Stats. 1898. Under this statute, it has been held that no interest could be recovered on county orders, even after presentment for payment. *Alexander v. Oneida Co.* 76 Wis. 56. In the case of a town order, the inhibition against the running of interest is by rule of common law; in the case of a county order, it is by statute; but the effect is manifestly the same. The legislature has recognized the necessity of legislative action in order to justify the payment of interest upon a town order by the passage of ch. 325 of the laws of 1899, authorizing the electors of a town, by vote, to declare whether town orders shall bear interest, and at what rate.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff for the amount of the orders which were stipulated to be valid, without interest.

CASSODAY, C. J., took no part.

WICKS BROTHERS, Respondent, vs. SCOTTISH UNION & NATIONAL INSURANCE COMPANY, Appellant.

September 27 — October 12, 1900.

Fire insurance: Surrender and cancellation of policy: Agency.

1. Plaintiff applied to R., an insurance agent, for insurance on its sawmill. Being unable to place the risk, R. applied to C., defendant's agent, and procured a policy in defendant to be issued on the mill, the policy containing a provision for cancellation by defendant on giving five days' notice. When the issuance of the policy was reported to the home office, defendant immediately notified C. to cancel it. C. in turn notified R. of the cancellation, and R. notified plaintiff, requesting a return of the policy, and stating that he would attempt to procure other insurance. Plaintiff forwarded the policy by mail to R., who received it three days after the receipt of notice of cancellation, but an hour and a half after a loss had occurred. and retained it in his possession until suit was brought thereon. *Held*, that the policy was in force at the time of the loss, there being no showing of any intention to consent to immediate cancellation. and R.'s acts being in harmony with a continuance of the policy until canceled at the end of five days pursuant to its terms.
2. The right to cancel a policy of insurance does not exist at all except by contract, and stipulations to that effect are to be construed with reasonable strictness.

APPEAL from a judgment of the circuit court for Douglas county: JAMES O'NEILL, Judge. *Affirmed.*

Action upon a policy of insurance issued by defendant upon plaintiff's sawmill, which was destroyed by fire May 14, 1899. The answer was that the policy had been surrendered and canceled before the fire. The case was tried by the court without a jury upon a stipulation of facts. The facts, briefly stated, are as follows: McBean, plaintiff's agent, lived in Duluth. In May, 1899, he applied to Rogers-Ruger Company, a corporation doing an insurance business at West Superior, for insurance on the sawmill. The Rogers-Ruger Company was unable to place it, but told him

they would try and secure it. Application was made by the company to Culver & Harper, defendant's agents, and on May 6, 1899, the policy in suit was issued, on the understanding that the two agents were to divide commissions, and that premium should be charged up and collected at the end of the month. The issuance of the policy was reported to the home office at Hartford, Connecticut. On May 11th the defendant wired its agents to cancel the policy as undesirable. Culver & Harper telephoned the Rogers-Ruger Company the policy had been ordered canceled, and they said they would send and get the policy. May 12th the Rogers-Ruger Company wrote to McBean as follows: "The *Scottish Insurance Co.* have ordered the insurance canceled on the Bell Mill. Kindly return us the policy. We will endeavor to replace it in some other company, but it is pretty hard to get them to carry it." May 13th, which was Saturday, McBean mailed the policy to the Rogers-Ruger Company, with a letter stating that he had a chance to sell the mill, and that if insurance could not be secured he did not feel that it was right to allow the matter to stand as it was. At that time the sawmill was leased from week to week to parties who were sawing some logs for the Rogers-Ruger Company, and the understanding was that the mill might be sold at any time in case insurance could not be carried upon it. The letter inclosing the policy was received by Rogers-Ruger Company, Sunday, May 14th, at 12:30. The loss occurred on the same day, about 11 o'clock a. m. The Rogers-Ruger Company held the policy from the time it was so received and until suit was brought. As soon as Culver & Harper received the telegram ordering cancellation of the policy on May 11th, they stamped on their books that said policy was canceled, and credited the amount of the premium they had charged to Rogers-Ruger Company on May 6th. Due proofs of loss were furnished, but the defendant denied liability on the

ground that the policy had been surrendered to Rogers-Ruger Company, as its agent. The court found that the policy was in force at the time of the fire, and gave judgment for plaintiffs, from which defendant has appealed.

H. H. Grace, for the appellant.

For the respondent the cause was submitted on the brief of *H. V. Gard.*

BARDEEN, J. The policy in question was in the form required by the laws of this state. It contained a provision that "this policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation." It is not claimed that there has been any cancellation under the terms of the policy. The argument is, however, that when the policy was delivered to the plaintiff's agent by the Rogers-Ruger Company the latter's agency terminated; that by force of the statute (sec. 1977, Stats. 1898) the Rogers-Ruger Company was the agent of the defendant; and that the surrender of the policy to it by McBean was a surrender to defendant, and the policy became canceled or of no effect when he mailed his letter on the forenoon of May 13th.

There can be no doubt of the fact that the parties to an insurance contract may agree upon terms of cancellation different from those stipulated in the policy. Ostrander, Fire Ins. § 19. The trouble with the argument here is that there is no proof of any such agreement, and no proof of any facts from which such an agreement is properly inferable. The telegram from the home office to Culver & Harper was: "Please cancel seven naught eight; Wicks portable sawmill; undesirable." There is no suggestion that it should be canceled in any other way except under the terms of the policy. The agents telephoned Rogers-Ruger Company that it had been ordered canceled. The company wrote McBean to the same effect, and requested a return of the policy.

Still no suggestion that there was to be any departure from the policy requirements. Without any notice that any different plan was to be pursued than was prescribed by the contract, McBean sent the policy to the Rogers-Ruger Company. Under these circumstances, he had a right to rely upon the assumption that it would be canceled in the regular way, unless we can find something in the case from which an intention to surrender for short cancellation can be inferred. We are satisfied that the case is barren of facts to support any such inference. It is admitted that when the insurance was effected the Rogers-Ruger Company was agent of the plaintiff. It may also be admitted that by virtue of the statute it was also agent of the defendant, acting, in a measure, in a double capacity. *John R. Davis L. Co. v. Hartford F. Ins. Co.* 95 Wis. 226. The two relations were not inconsistent, and, upon delivery and acceptance of the policy, such relationship became terminated. The transaction was closed, because the purposes of the agency had been satisfied. This was the situation when the defendant ordered the policy canceled. Its agents notified the Rogers-Ruger Company of the fact, and, so far as the proof shows, the latter volunteered to send and get the policy. There was no request that this should be done, or authority given in any way to represent the defendant. At that time the Rogers-Ruger Company had an interest in the sawmill arising from the fact that the lessees were sawing their logs. Unless it could be kept insured, the mill could have been sold at any time. So, when they wrote McBean that the defendant had ordered the policy canceled, they also notified him that they would endeavor to secure other insurance. His answer thereto is a tacit acceptance of their offer, for he said: "If we cannot carry insurance, I do not think it is right to allow the matter to stand as it is." If the company was still to represent him in the matter of securing other

insurance, the return of the policy to it was certainly consistent with the idea that they should hold the policy for him until the time limited for cancellation had expired. In absence of proof of express notice that the defendant desired to vary the stipulation for cancellation, the inference arising from the conduct of the parties points strongly toward this conclusion. The risk was undesirable, and it was difficult to secure insurance. The assumption that it was McBean's intention to assent to immediate cancellation does violence to his business judgment. He is presumed to know of plaintiff's rights under the policy, and, under the circumstances, it is quite reasonable to assume that by sending the policy to them he intended nothing more than that they should hold it for cancellation under its terms. There is a lack of any circumstance tending to show an intention to surrender for instant cancellation. Every probability tends the other way. Moreover, the circumstances are deemed sufficient to show that the company was continuing to act as the agent of the plaintiff in the matter as before, and, even if it be admitted that it was also defendant's agent, the absence of any showing of an intention to consent to immediate cancellation is fatal to the defendant's contention. Without such showing the acts of plaintiff's agent must be construed as being in harmony with a continuance of the insurance contract until canceled pursuant to its terms. The right of cancellation does not exist at all except by contract, and stipulations to that effect are construed with reasonable strictness.

The effort to bring the situation within the cases of *Walters v. St. Joseph F. & M. Ins. Co.* 39 Wis. 489, and *Bingham v. Ins. Co.* 74 Wis. 498, must fail because of the marked difference in the terms of the policies. In both of these cases the policies provided that they might be canceled *at any time* by the company on refunding or tendering to the assured a ratable proportion of the premium for the time unexpired.

The circumstances clearly showed that the policies were surrendered with the intention of canceling the insurance.

No further discussion of the case is deemed necessary.

By the Court.—The judgment of the circuit court is affirmed.

CASSODAY, C. J., took no part.

CARPENTER, Respondent, vs. MCCORD LUMBER COMPANY and another, imp., Appellants.

September 27 — October 12, 1900.

Logs and lumber: Liens: Building logging railroad: Pleading: Alleging corporate existence.

1. Under lien statutes services of almost any character which are performed as a part of, and as mere incidents in, the work for which a lien is given, are protected, although the same kind of services, performed independently of the lienable work, are not entitled to a lien.
2. Plaintiff performed labor for a railway company in building and keeping in repairs its railway, which was constructed for reaching and hauling all timber tributary thereto, including that of the defendant corporation, which railway was removed to reach other general regions of country only after the exhaustion of timber in that of its original construction. Logs of the defendant corporations were hauled out on such railroad, and plaintiff having taken the formal steps for establishing a lien under sec. 3329, Stats. 1898, conferring the right to a lien for "labor and services in cutting or hauling . . . logs, timber," etc., brought this action to enforce his claim for lien. *Held,* that he was not entitled to a lien for his services, the work of constructing or making general repairs upon the railroad being in no proper sense incidental to, or an integral part of, the hauling of the logs.
3. Failure to allege that a plaintiff or defendant is a corporation, and where incorporated, as required by sec. 3205, Stats. 1898, renders a complaint insufficient, and the defect may be reached by a general demurrer.
4. That a defendant sued as the McCord Lumber Company is intended to be sued as a corporation sufficiently appears from its name.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Appeal by the *McCord Lumber Company* and the *Soper Lumber Company* from an order overruling their joint general demurrer to the complaint, which alleges that the plaintiff and his assignors performed work in hauling certain logs at the employment of the Bayfield Western Railway Company, which logs belonged to the *McCord Lumber Company*, have now been sawed into lumber, and are located at West Superior, in Douglas county, and marked sold to the defendant the *Soper Lumber Company.* The specific work performed by plaintiff and his assignors was in grading, leveling, repairing, and building the logging railway of the defendant the Bayfield Western Railway Company, laying ties and rails, taking up ties and rails as soon as the timber tributary to said road had been cut and hauled, and relaying them in other places where the timber had not been hauled; the greater portion of the work so done was performed for the purpose of hauling out, and in the hauling out, of the above-mentioned logs, but other logs were also hauled during the same period. The formal steps for establishing a lien under sec. 3329, Stats. 1898, are alleged, and a lien claimed upon the lumber sawed from the *McCord Lumber Company's* logs, and now supposed to belong to the *Soper Lumber Company.* There is no allegation as to the corporate or other character of any of the three defendants.

For the appellants there was a brief by *Sanborn, Luse, Powell & Ellis*, and oral argument by *L. K. Luse.* They contended, *inter alia*, that the demurrer should have been sustained, because the complaint failed to allege the incorporation of defendants, or any of them. Bliss, Code Pleadings, §§ 246–260; *State v. C., M. & St. P. R. Co.* 4 S. Dak. 261; *Loup v. C. S. R. Co.* 63 Cal. 199; *People v. C. P. R. Co.* 83 Cal. 393; *Stanly v. R. & D. R. Co.* 89 N. C. 331; *Mechanics' Banking Asso. v. Spring Valley S. & L. Co.* 13 How. Pr. 227;

First Nat. Bank v. Doying, 13 Daly, 509; *National T. S. & P. House v. Anderson*, 2 N. Y. Supp. 49; *Oesterreicher v. Sporting Times P. Co.* 5 N. Y. Supp. 2; *Clegg v. Chicago Newspaper Union*, 8 Civ. Pro. Rep. 401; *Chandler v. Erie T. Co.* 19 Civ. Pro. Rep. 385. The plaintiff is not entitled to a lien upon the property described in the complaint. *Young v. French*, 35 Wis. 111; *Winslow v. Urquhart*, 39 Wis. 260; *Minton v. Underwood L. Co.* 79 Wis. 646; *Bradford v. Underwood L. Co.* 80 Wis. 52, 53; *Storm v. Cotzhausen*, 38 Wis. 139; *State ex rel. S. B. & L. M. S. C. & H. Co. v. Comm'rs*, 34 Wis. 166; *Purtell v. Chicago F. & B. Co.* 74 Wis. 132; *McAuliffe v. Jorgensen*, *ante*, p. 132; *Lohman v. Peterson*, 87 Wis. 227; *Glover v. Hynes L. Co.* 94 Wis. 457.

For the respondent the cause was submitted on the brief of *T. M. Thorson.* He contended, *inter alia*, that there is nothing on the face of the complaint to indicate that the defendants, or any of them, are corporations, and the court cannot assume such facts in aid of the demurrer. For aught that appears on the face of the complaint the defendants may be joint-stock companies, or partnerships, in which case no averment setting forth the character in which the defendant is sued is necessary. If the pleading is indefinite and uncertain in that regard, the statute provides an adequate remedy. *Irving Nat. Bank v. Corbett*, 10 Abb. N. C. 85; secs. 2612, 2668, 2829, 3210, Stats. 1898; *Phœnix Bank v. Donnell*, 40 N. Y. 410; *Bank of Havana v. Magee*, 20 N. Y. 355; *Rothschild v. Grand Trunk R. Co.* 14 N. Y. Supp. 807; *Adams v. Lampson C. S. Co.* 89 Hun, 127; *Second Nat. Bank v. Wells*, 53 How. Pr. 242; *Stanly v. R. & D. R. Co.* 89 N. C. 331; *South Yuba W. & M. Co. v. Rosa*, 80 Cal. 333; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648.

DODGE, J. 1. The first and most important question raised by the demurrer is whether the services set forth are within the description of those for which sec. 3329, Stats. 1898, con-

fers a lien, namely, "labor or services in cutting or hauling . . . logs, timber," etc. This statute, it has been well said, was passed for the protection of laboring men, who, by reason of their exigences, are generally neither able to investigate or insist upon the credit of their employers, nor, without suffering, to endure the loss of the wages upon which they depend for existence, and is therefore to receive liberal construction. The question of the character of services to which it extends has received consideration in the following cases in this state: *Young v. French*, 35 Wis. 111; *Winslow v. Urquhart*, 39 Wis. 260; *Minton v. Underwood L Co.* 79 Wis. 648; *Bradford v. Underwood L. Co.* 80 Wis. 50; *Glover v. Hynes L. Co.* 94 Wis. 457; *Kendall v. Hynes L. Co.* 96 Wis. 661.

In *Young v. French* and *Winslow v. Urquhart* it was held that a cook who, as one of a gang of men engaged directly upon the logs, in the one case in cutting, and in the other in driving, cooked the food for the others, was entitled to a lien for his wages, the court saying in the latter case: "He performs services in cutting and driving such logs within the meaning of the statute, as much as those who use the ax, the saw, or the team to the same end." In *Bradford v. Underwood L. Co., supra*, claim for lien was made by one who contracted with the contractor for log driving to supply board to the latter's men. The court held him not entitled to a lien, for the reason that he was, in effect, "furnishing supplies," which were denied a lien by express statute. It was said: "Only he who cooks the food for those employed to do work upon the timber, where the provisions are supplied by the employer, is given a lien." This rule obviously would have as well excluded the plaintiff's cook, who performed the services, as it did exclude the plaintiff himself from lien. In *Minton v. Underwood L. Co., supra*, plaintiff, who had been one of the gang engaged in driving the logs, put in his last day in gathering up the tools which had been used on the

drive. It was contended that this was not "labor in driving the logs." The court held that it was an essential part of the work of the drive, and that he was entitled to a lien therefor. In *Glover v. Hynes L. Co.*, *supra*, plaintiff performed work for more than a month before a sawmill started in superintending the building of an addition to the mill and putting in the machinery. After the mill started, and the sawing of the lumber in question was begun, he continued to superintend the putting in of new machinery and the making of permanent improvements to the mill, and at the same time superintending the keeping of the machinery in the mill in repair when breakage occurred. He offered no evidence as to how much of the labor was of the one character or of the other. The court held that a portion at least of the labor was not protected by a lien, that the statute gives a lien only for labor and services performed in manufacturing the lumber, and it was the plaintiff's duty to show the amount of such labor and services. He therefore was denied any recovery. In *Kendall v. Hynes L. Co.*, *supra*, plaintiff's labor was done in driving piles and building docks and tramways for permanent use in connection with the sawmill at which the lumber in question was sawed. Such structures were necessary to the business of manufacturing logs into lumber. It was held that for such work he was not entitled to lien. The court said: "We cannot so construe the statute as to include work done in the original construction of any part of a sawmill plant to be used in manufacturing logs into lumber, and caring for the manufactured product till moved off from the mill premises. The same rule applies to permanent improvements and necessary appurtenances to the sawmill property."

In Maine, under a statute much like ours, it was held that work about the camp in filing saws, repairing sleds, keeping time, and being generally useful was not within the designation of either "cutting, falling, or hauling." *Kelley*

v. Kelley, 77 Me. 135. In *Oppenheimer v. Morrell*, 118 Pa. St. 189, it was held that lumber furnished to a mason contractor knowingly for the purpose of scaffolds was not furnished "for or about the construction of the building." In *Bashor v. B. & O. R. Co.* 65 Md. 99, it was held that a stone crusher and conveyor furnished to a bridge contractor was not material furnished in or about the construction of the bridge, but was a supplying of the contractor with his plant. That distinction was approved and applied by this court in *McAuliffe v. Jorgenson*, *ante*, p. 132. In *Stewart-Chute L. Co. v. M. P. R. Co.* 28 Neb. 39, a lien was sustained in favor of one who furnished lumber to a railroad contractor, which lumber was in fact used for the building of the temporary shanties and stables for the protection of his men and horses while performing the work. The court held that it was incidental to, and a part of, the work of construction. In *Proulx v. Stetson & P. M. Co.* 6 Wash. 478, some of the lieners, belonging to a gang of men employed through the season by one who had contracted to cut and haul the logs to water, were engaged part of the time in clearing roads over which the logs were so hauled. It was held that the work was entitled to lien, as being done under the terms of their statute, in "assisting in obtaining or securing saw logs." In *Duggan v. Washougal L. & L. Co.* 10 Wash. 84, the plaintiffs, with others, constituted a driving gang, and in the course of driving the logs found it necessary to blast out rocks in the river. Such service was held lienable under the same statute. Other work was held too remote from the work of "assisting in obtaining or securing logs," such services being rendered under the employment of the contractor in opening a road which had been laid out by the county commissioner, such opening being done in order to make it practicable for the teams in hauling supplies for the camp. No logs were hauled over this road, and it was not intended to be used for that purpose. The

court said: "We think we went as far as we should in the direction of sustaining liens for roadbuilding in the *Proulx Case*, *supra*.

The general rule of demarkation which fairly results from the cases thus far decided, and which will effectuate the legislative purpose, liberally construed, may be stated to be that services of almost any character which are performed as a part of, and as mere incidents in, the work for which a lien is expressly given, should be protected, although the same kind of services, performed independently of the lienable work, are not entitled to lien. Thus, an axman is none the less engaged in cutting or felling timber or logs while replacing a broken ax helve, and probably the detailing of one of the cutting gang to the doing of such work for all the others would not exclude him from the category of those engaged in cutting or felling. On the other hand, one employed out of the logging season, and not in connection with any logging job, to put in repair generally his employer's axes, could not fairly be said to have performed services in felling all the timber which might be cut thereafter with those axes. Such a latitudinarian construction would logically extend liens to the men who make the axes or the wagons which may be sold to the logger, and could hardly stop short of those who forge the steel or even mine the ore therefor. Of course, such an interpretation would be absurd, and, instead of being liberal to those whose labor actually produces the logs or lumber, would defeat their security, by burdening the product of their labor with liens to more than exhaust its value.

Another limitation which is already quite well established by our own decisions is that expressed in *Basshor v. B. & O. R. Co.* 65 Md. 99, and in *Kendall v. Hynes L. Co.* 96 Wis. 661, namely, that services rendered in preparation, improvement, or permanent repair of a plant with which the lienable work is to be done are not a part of that work.

It is entirely apparent that the services of the plaintiff and his assignors, within the views above suggested, were not done in hauling the logs in question. The complaint is to be liberally construed, but at the same time reasonably. Therefrom it appears that plaintiff worked for defendant railway company in building and keeping in repair its railway, which was constructed for reaching and hauling all the timber tributary thereto, not the *McCord Lumber Company's* timber alone, but any other as well, and which railway was removed to reach other general regions of country only after exhaustion of timber in that of its original construction. That railroad obviously had all the characteristics of a plant or establishment with which defendant railway company equipped itself in order to perform the work of hauling logs generally. The work of constructing it or making general repairs upon it was in no proper sense incidental to, or an integral part of, the hauling of logs, any more than was the repairing of the mill a part of the sawing in *Kendall v. Hynes L. Co., supra.* This situation sufficiently appears by the complaint, and the demurrer thereto should not have been overruled.

2. Another defect or insufficiency pointed out as ground of general demurrer is that the complaint fails to allege that the appellants are or either of them is a corporation, and, if so, where incorporated, in compliance with sec. 3205, Stats. 1898. That statute provides: "In an action by or against a corporation the complaint must aver that the plaintiff or defendant, as the case may be, is a corporation. If it was incorporated under the law of this state, that fact must be averred; if it was not so incorporated, an averment that it is a foreign corporation is sufficient." That the appellants are intended to be sued as corporations sufficiently appears from their names. *Brauser v. New England F. Ins. Co.* 21 Wis. 506. That being so, the complaint fails to comply with the requirement of the statute. How such in-

sufficiency should be raised may be matter of some doubt. Certainly, however, an objection by reason thereof ought to be possible before a defendant is required to answer on the merits. The decisions in the Practice Reports of New York upon a similar statute are far from harmonious as to whether motion or general demurrer is the proper method. This court has never decided the question. It is therefore before us for an original one. Upon full consideration, we have determined that the legislative purpose will be best subserved by taking the statute according to its letter, and holding that, in case of a suit by or against a corporation, the fact of incorporation, either under the laws of this state or under the laws of some other government, must be alleged, and that a complaint which fails to comply with this requirement does not state the facts necessary to constitute a cause of action, and is therefore obnoxious to a general demurrer on that ground. So construing the statute, we must hold the present complaint insufficient for want of the averments as to incorporation of the appellants, and for that reason also demurrable.

By the Court.— The order of the circuit court is reversed, and the action remanded with directions to sustain the demurrer of the appellants.

CASSODAY, C. J., took no part.

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110 *416

HUDSON, by guardian *ad litem*, Respondent, vs. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

September 27 — October 12, 1900.

Negligence: Court and jury: Pleading: Guardian ad litem: *Instructions to jury: Proximate cause.*

1. In an action to recover for personal injuries, it appeared, among other things, that plaintiff, a boy nine years old, went onto defendant's drawbridge, 228 feet long, at the request of the bridge tender, and, as the bridge was being closed, stood at one end of the draw to signal the tender when to stop. The bridge was operated by means of a sweep or lever, connected with the gearing below, the bridge tender taking hold of the end and traveling in a circle while closing the bridge. Plaintiff, whose foot was crushed by being caught between the ends of the rail on the bridge and the shore rail, testified that he stood facing the end of the bridge with his foot on the rail. There was no evidence that the place where he stood was dangerous, or that the bridge tender could have seen his danger. *Held*, that there was no evidence to sustain a finding of defendant's negligence.

[2. Whether, the allegation of the appointment of a guardian *ad litem* being denied and no proof being offered to support it, the cause of action fails, not decided.]

3. An instruction that proximate cause is that from which the result follows as the natural and probable consequence,— probable from the standpoint of the person who is charged with the lack of ordinary care claimed as the cause of the result complained of,— is erroneous. He is chargeable with such consequences as a person of ordinary intelligence and prudence ought reasonably to have foreseen would follow as the natural and probable result of his acts.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

The plaintiff was a minor about nine years old, living in the city of Superior. The defendant is a railroad corporation, and, as a part of its line of railway, owned and operated a drawbridge across Nemadji river, in said city, used exclusively for railroad purposes. It employed and kept a bridge tender, whose duty it was to open the drawspan to

allow the passage of boats on the river. On September 13, 1899, the plaintiff, with another boy, was playing on the banks of the river, near the bridge. A vessel desiring to pass signaled for the opening of the bridge. The tender invited the boys to go upon the bridge with him while it was being swung, to assist in its opening, which invitation was accepted. The bridge was opened, the boys assisting, and remained open half or three quarters of an hour, and until the boat returned. They then started to close the bridge. The span was 228 feet, and was operated by a sweep or lever in the center, which is connected with the gearing below, and the bridge was closed by the operator taking hold of the end of the sweep and traveling in a circle. The other boy assisted the tender in closing the draw. The plaintiff went out to one end to ride, and stood facing the abutment, to signal when the draw was closed. He said he had his foot on the rail, and as it closed his foot was caught between the end of the rail of the bridge and the rail of the land side, and was crushed. This action is brought to recover damages for such injury. The negligence alleged is that "the said watchman negligently and carelessly, and without any regard for the safety of the said *Ralph Hudson*, closed the said draw in a reckless and heedless manner." The court refused defendant's motion for a direction of a verdict. A verdict of $373 was rendered for the plaintiff. The court refused to disturb it, and from a judgment for plaintiff the defendant has appealed.

Louis Hanitch, for the appellant.

For the respondent there was a brief by *Crownhart & Foley*, and oral argument by *W. R. Foley*.

BARDEEN, J. The first error assigned is that the court erred in refusing to direct a verdict for defendant. This involves a consideration of the evidence in the case. We have reviewed it carefully, and are unable to find any evi-

dence to sustain the charge of defendant's negligence. The theory upon which plaintiff's counsel seeks to sustain this action is that plaintiff's position on the end of the draw was perilous, and that the bridge tender was negligent in closing the draw while he stood in this dangerous place. In our view of the case, it becomes unnecessary to inquire whether the plaintiff was a volunteer, a trespasser, or in what capacity he stood while on the bridge. Even if it be conceded that he was rightfully there, his case will be in no way strengthened. The plaintiff was a bright, intelligent boy, nearly nine years of age. As the bridge was being closed he went toward the end, as he claimed, to ride, and to signal when it had been turned into place. He was then about 114 feet from where the bridge tender was at work. He stood with his back toward the tender, *his foot on the rail.* As the bridge closed, his foot was caught between the end of the rail on the bridge and the end of the shore rail. In the performance of his work the bridge tender followed the sweep or lever used to close the bridge, traveling in a circle. In passing around, there would be a short time during each circuit when his face would be toward the end of the bridge where the boy was. There can be no doubt but that he knew the boy had gone out to the end of the bridge. There is nothing, however, in the case to show that this was hazardous, or that any particular danger threatened the boy. It is not shown that the boy was *non sui juris.* On the contrary, the evidence shows that he was exceedingly bright and intelligent for his age. So there was nothing in the age of the child, or the fact that he went to the end of the bridge to ride, that would charge the tender with any apprehension of danger. There is no evidence showing just how long the plaintiff had been in the position he was in when hurt. Neither is it shown that the tender saw or could have seen that the boy's foot projected beyond the end of the bridge, as it must have done to get

caught. Nor is it explained how, his foot being *on the rail*, it was possible that his toes should be caught between the rails. In fact, it is incomprehensible how, if his foot remained on the rail, it could have been caught and crushed as he says that it was. If he stood there with his foot on the rail, as he repeatedly says he did, he could not have been injured, except by an instant change of position. This is the only possible explanation of the accident. The bridge tender was not bound to anticipate such action on his part. Had his foot remained upon the rail, he was in no peril, caused by the operation of closing the bridge. Had the boy stood with his foot projecting beyond the end of the bridge in such a manner that it was likely to be caught, there is no proof that the bridge tender could have seen or did see him in such position. The extent to which the evidence goes is that, when making his rounds in closing the bridge, for a portion of the time his face would be toward where plaintiff was standing, and he could then see the end of the bridge. Actionable negligence cannot be predicated upon vague surmises or uncertain inferences. "There must at least be sufficient evidence to remove the question from the realms of mere conjecture, else the trial court should pronounce the judgment of the law on the situation, by taking the case from the jury when requested so to do." *Hyer v. Janesville*, 101 Wis. 371.

Another question raised is that, the allegation of the appointment of a guardian *ad litem* being denied, and no proof being offered to support it, the cause of action fails. We need not determine this question, as the judgment must be reversed, and, if tried again, proof of such appointment can readily be made.

The court charged the jury that "proximate cause is that from which the result follows as the natural and probable consequence,—probable from the standpoint of the person who is charged with the lack of ordinary care claimed as

the cause of the result complained of." This definition is more favorable to the defendant than the law warrants. The standard of care usually required of the person who is charged with negligence is ordinary care. He may be in fact a very careless or a very cautious person. His standpoint may be the one or the other. The legal standard is that he is chargeable with such consequences as he, being a person of ordinary intelligence and prudence, ought reasonably to foresee would follow as the natural and probable result of his acts. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279; *Nass v. Schulz*, 105 Wis. 146.

Again, the court charged the jury that, "There is no direct evidence that the bridge tender, Vreeland, saw plaintiff in the position in which he stood when he was hurt. You are instructed, however, that from the evidence in the case it is competent for you to infer and find that plaintiff was seen in such position before the accident happened, by Vreeland; but you are instructed that you are not, from the evidence, compelled, as a matter of course, to find that he did so see him." As we have already seen, this instruction was wrong, because there is no evidence in the case to warrant the conclusion that he saw him in the position he was when his foot was crushed.

By the Court.— The judgment of the superior court of Douglas county is reversed, and the cause remanded for a new trial.

CASSODAY, C. J., took no part.

SWAN, Administrator, Respondent, vs. NORVELL and another, Receivers, Appellants.

September 27 — October 12, 1900.

Special administrator: "Personal representative:" Capacity to sue for death of his decedent.

1. A special administrator, so long as he continues in office, is "the personal representative" of the deceased.
2. Under sec. 4256, Stats. 1898 (providing that actions for wrongful death "shall be brought by and in the name of the personal representative of such deceased person"), a special administrator may bring such an action, and, if his office terminates during its pendency, the general administrator may be admitted to prosecute it to judgment.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

For the appellants there was a brief by *Ross, Dwyer & Hile*, and oral argument by *W. D. Dwyer.*

For the respondent there was a brief by *Crownhart & Foley*, and oral argument by *W. R. Foley.*

WINSLOW, J. The plaintiff, in his capacity as special administrator of the estate of his deceased infant son, brings this action for damages, alleging the death of his said son by the negligence of the defendants' servants, and also alleging his own appointment as special administrator of the estate of the deceased prior to the commencement of this action. A demurrer to the complaint on the ground that the plaintiff has not legal capacity to sue was overruled, and the defendants appeal.

The sole question is whether a special administrator, under our statutes, is empowered to bring and maintain this action, or whether it can only be brought by the general administrator. This is purely a question of statutory construction.

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such a rule. If his office terminates by the appointment of a general administrator pending the action, the general administrator may be admitted to prosecute the action to judgment. Stats. 1898, sec. 3813.

By the Court.— Order affirmed.

CASSODAY, C. J., took no part.

FRENCH LUMBERING COMPANY, Respondent, vs. THERIAULT and wife, Appellants.

107 627
108 314

107 627
112 [3]410
112 [3]453

107 627
113 [3]191

September 27 — October 12, 1900.

Debtor and creditor: Fraudulent conveyances: "Void" in statute: Lien of judgment docketed against fraudulent vendor: Priority: Equity: Remedies: Deed of insane person, when voidable.

1. The word "void," in sec. 2320, Stats. 1898, relating to fraudulent conveyances of property by debtors, means voidable.
2. A deed of real estate made under such circumstances as to fall within the condemnation of sec. 2320, Stats. 1898, nevertheless passes title to the property to the fraudulent vendee, so that a judgment thereafter rendered on a precedent debt of the vendor and duly docketed does not become a specific lien on the land under sec. 2902, which provides that a money judgment, docketed in the office of the clerk of the circuit court of a county, shall be a lien on the real property of the judgment debtor in such county.
3. Under such circumstances as those stated in No. 2:

   (a) A judgment creditor can obtain a specific lien on the real property of the judgment debtor by levy thereon under an execution issued on the judgment, and then equity will aid him to remove the impediment to an advantageous sale thereof and enforcement of the lien created by the fraudulent transfer.

   (b) Equity will not aid a judgment creditor till he actually obtain a specific lien by attachment of the property under writ of attachment or levy thereon under an execution, or he has exhausted all his legal remedies to collect his claim. The last condition mentioned being satisfied, equity will enforce the creditor's right to a lien on the property in an action to annul the fraudulent transfer of the property so that the judgment may attach thereto.

(c) If the fraudulent vendor die before a specific lien shall have been obtained on the property, the judgment cannot be enforced by execution against such property under sec. 2978, Stats. 1898, and a lien be thereby secured which equity will protect.

4. A deed made by an insane person not under guardianship is voidable only. It passes title so that a judgment thereafter rendered and docketed will not be a specific lien on the property conveyed till the conveyance be actually avoided; and if before that occur the insane person die, the judgment creditor cannot, by execution levy under sec. 2978, Stats. 1898, obtain a lien on such property which equity will aid by removing the cloud created thereon by such conveyance.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Reversed.*

The complaint states, in substance, the following: Plaintiff is a domestic corporation. February 23, 1898, it recovered a judgment in the circuit court for Chippewa county, Wisconsin, against Isador Lavoie, for $2,824.60, that was duly docketed on the succeeding day in the office of the clerk of the circuit court for said county, and upon which, September 8, 1899, and before the commencement of this action, an execution was duly issued. Pursuant to such execution the sheriff of said county levied upon and advertised for sale certain lands (describing them) situated in said county, to satisfy the amount due upon the judgment, with interest and costs. January 24, 1898, said Lavoie was, and for some time prior thereto had been, insane, and on that day he was so adjudged and committed to one of the asylums of this state. On the same day *John Theriault*, with knowledge of the incompetency of Lavoie, fraudulently induced him to execute and deliver to said *Theriault* a deed conveying to him the said lands, which were then the property of Lavoie, with intent on the part of said *Theriault* to hinder and delay said Lavoie's creditors, particularly plaintiff. When *Theriault* obtained said deed, he knew that Lavoie was insane and incompetent to make it and also knew that Lavoie was largely

indebted to plaintiff and to other parties. *Theriault* did not give any consideration for the lands. The indebtedness to plaintiff was contracted on the faith of a promise made by Lavoie to secure the payment thereof by a mortgage on said land, which promise Lavoie intended in good faith to fulfill, but was prevented from doing so by his becoming insane. Lavoie died March 5, 1898, without leaving property sufficient to anywhere near pay his indebtedness.

The prayer for relief was that the conveyance to *Theriault* be declared void as to plaintiff, that *Theriault* be enjoined from selling or incumbering the lands, and that a lien be adjudged thereon in plaintiff's favor for the amount of its judgment and costs.

The defendants demurred to the complaint for want of facts stated therein sufficient to constitute a cause of action, and for defect of parties defendant in that the administrator of Lavoie's estate, his widow and heirs, were not joined as defendants. The demurrer was overruled and defendants appealed.

For the appellants there was a brief by *W. M. Bowe* and *J. A. Anderson*, and oral argument by *Mr. Bowe.*

For the respondent there was a brief by *W. H. Stafford*, attorney, and *W. F. Bailey*, of counsel, and oral argument by *Mr. Bailey.*

MARSHALL, J. Sec. 2902, Stats. 1898, is to the effect that a money judgment, when docketed as provided by law, shall, for a period expiring ten years from the date of the rendition thereof, be a lien on the real property of the judgment debtor, except his homestead, in the county where the same is docketed. If the real estate which respondent seeks to reach in this action was the property of Lavoie, within the meaning of that section, when the judgment against him was docketed it obviously became a lien thereon. Sec. 2978 provides that after the expiration of one year from the

death of a judgment debtor, execution may be issued by permission of the court or the judge thereof upon good cause shown, against any property upon which such judgment shall have been a lien at the time of the death of such debtor, and may be executed in the same manner and with the same effect as if he were living. According to the complaint plaintiff was a judgment creditor of Lavoie when he died. All the facts exist and are properly alleged in the complaint requisite to the maintenance of the action to remove the apparent impediment to respondent's judgment lien, created by the deed of Lavoie to *Theriault* made prior to the rendition of the judgment, if, notwithstanding such deed, such judgment was in fact, at the time of the death of the grantor, a specific lien upon the land. It is conceded that, if the lien did not exist by virtue of the judgment alone, none was acquired by the execution issued thereon after Lavoie's death, because in that event the execution was wholly unauthorized by law and void.

From what has preceded this is the first question to be solved in reviewing the decision of the circuit court overruling the demurrer to the complaint: Is a judgment, properly docketed in the county where real estate is located which the judgment debtor previously owned but before such docketing conveyed to another, a lien on such real estate if such conveyance is void under sec. 2320, Stats. 1898? That section provides that: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, . . . made with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands . . . shall be void." The learned counsel for respondent contend that the word "void" in the section means absolutely void; that as regards a person circumstanced as plaintiff was when Lavoie made his deed to *Theriault*, the title to the property attempted to be conveyed remains entirely unaffected by

such attempt; and that the judgment attaches to and becomes a lien thereon accordingly. That such is the law in many and perhaps most jurisdictions, and is so laid down by many and perhaps most if not all of the elementary writers, as contended by the learned counsel for respondent, possibly cannot be successfully denied. But that the law is to the contrary as declared by this court as early at least as *Hyde v. Chapman*, 33 Wis. 391, decided in 1873, certainly cannot be gainsaid. The doctrine of that case was fully considered and approved by this court in *Gilbert v. Stockman*, 81 Wis. 602, decided in 1892. True, the decision there was made by a divided court, but that hardly takes much from its force as regards what the law is for this state, since it has existed for over a quarter of a century and necessarily has become by that lapse of time a rule of property. We are not unconscious at all of the force of the attack now made upon the doctrine of this court. It is but a renewal of the attack made in *Gilbert v. Stockman*, where, notwithstanding strong judicial opposition, as indicated by the able and exhaustive dissenting opinion written by Mr. Justice PINNEY, concurred in by Mr. Justice WINSLOW, the early view of the law declared in *Hyde v. Chapman* was adhered to. It is needless to speculate now upon how the court would then have decided or as present constituted would decide if the question were presented as an original proposition. It will be readily admitted that the law of the state, as declared by its highest court, upon a careful consideration of the subject involved, should not be changed without some very strong reason therefor. A mere change in the personnel of the bench, and of individual opinions of judges, is not sufficient; and when the law as so declared has remained undisturbed for a long period of time, for example, twenty-five years or more, and necessarily become a rule of property, it should not be changed at all by mere judicial declaration. Under such circumstances courts

must follow the maxim, "*Stare decisis, et non quieta movere.*" (To adhere to decisions, and not disturb questions that have been established.)

The foregoing renders unnecessary any attempt even to review the able argument of counsel for respondent, by which the idea was vigorously pressed upon our attention and consideration that the word "void" in sec. 2320 means absolutely void as to creditors, and that a judgment against the fraudulent vendor attaches to the property fraudulently conveyed regardless of the conveyance. It is sufficient to say that the contrary is the law of this state and that it is so firmly entrenched in our jurisprudence as not to be open to question. However, it is deemed best not to dismiss the subject without correcting the error counsel seems to have fallen into, that *Gilbert v. Stockman*, 81 Wis. 602, and *Hyde v. Chapman*, 33 Wis. 391, are out of harmony with other cases decided by this court. In endeavoring to make such correction we shall not attempt to defend the reasoning of prior decisions, but merely state the facts and conclusions of each case, treating the results as not now open to question.

In *Eastman v. Schettler*, 13 Wis. 325, upon which great reliance is placed to support the attack on *Gilbert v. Stockman*, it will be noted that, while the court said *arguendo* that 'if the conveyance of the land was made with intent to defraud the judgment creditor it was void and the judgment became a lien upon it,' the court was not speaking of the effect of the judgment by itself, but its effect under the circumstances of that case, which were that it had been enforced by a seizure of the realty in question (so far as such a seizure can take place under an execution), a sale thereof under the execution, and the perfection of the sale by the making and delivering of a deed to the purchaser. Under those circumstances it was said that the purchaser could maintain an action to recover the land, because the deed

conveyed to him the title thereto regardless of the fraudulent conveyance of the property prior to the rendition of the judgment.

In the *Gilbert Case* the rule of the *Eastman Case* was limited to its facts upon the theory that the proceedings under the execution created a lien upon the property, but that none existed before the levy under the execution, which is in harmony with the cases that uphold the right to proceed in equity in aid of an execution levy upon land which has been conveyed by the judgment debtor in fraud of his creditors but deny the right in the absence of such levy, because, while the judgment of itself is not a lien upon the property, a lien thereon may be acquired by seizure thereof under the execution issued on the judgment.

In *Cornell v. Radway*, 22 Wis. 260, the sheriff had levied upon the property and advertised it for sale under an execution issued on the judgment. The court said the case belonged to that class where one is compelled to resort to a court of equity for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on execution, and not to the class where a person resorts to equity as a general creditor to obtain satisfaction of his debt; that, while in the latter class of cases all legal remedies must be exhausted as a condition precedent to the maintenance of the action, in the former the party has a right, under the established rules of equity jurisprudence, to invoke equity to remove a cloud upon an existing interest in real property. True, the court based its decision on *Gates v. Boomer*, 17 Wis. 455, remarking that such case was "an action by the judgment creditors of one of the defendants to have a deed executed by him to his codefendant set aside as a fraudulent obstruction to the proceedings of the plaintiffs to enforce the lien of their judgment, so that they might sell the property upon execution," and said, *arguendo* and partly outside the facts of the case, that, "The judgment of

the plaintiff is by statute a specific lien upon the land without the issue or levy of an execution. . . . The existence of the lien without adequate remedy for enforcing it at law, by reason of the fraudulent or inequitable obstruction interposed by the defendant, is sufficient to give a court equity jurisdiction," indicating that, to the writer of the opinion at least, the mere fact of proceedings having been had to enforce the judgment was without significance as regards whether the plaintiff was possessed of an interest in the property covered by the fraudulent conveyance, which equity would free from an existing cloud upon it. But the fact remains that these circumstances were present: an execution on the judgment and proceedings thereon against the property by a levy under the execution by advertising the property for sale as provided by law; which circumstances, later in the history of similar litigation, came to have controlling significance, and without conflict with anything actually decided in the *Cornell Case* when tested by its facts.

It will be found that there is nothing in *Gates v. Boomer* to call for or justify the remark made in *Cornell v. Radway*, so far as such remark was outside the facts of the case. In the former case the facts were that while there was no execution levy, an execution had been issued and returned unsatisfied, and all the legal remedies of the judgment creditor to collect his debt had been exhausted without his being able to obtain any satisfaction thereof. In that situation the court held that the creditor, as to property fraudulently transferred by the judgment debtor, and upon which the creditor would, but for such transfer, have had an unclouded specific lien, was entitled to invoke the aid of equity *to enforce his right to a lien* by removing the fraudulent obstruction thereto. "The case," said the court, "belongs to the class where the issue of the execution gives the plaintiff a specific lien upon the property, but he is compelled to go to a court of equity for the purpose of removing some obstruc-

tion fraudulently or inequitably interposed to prevent a sale on execution."

In *Galloway v. Hamilton*, 68 Wis. 651, the maintenance of an action in equity by a judgment creditor circumstanced somewhat different than respondent is, turned on the fact that a lien had been obtained by a levy upon the property under an execution, the prior cases in this court being referred to as in harmony with the decision. The court said, "If it be true that the real estate seized on the execution belonged to the judgment debtor, and a deed has been put upon record which purports to convey the legal title to another, which will have the effect to defeat or greatly impair the lien unless the deed is canceled, we suppose it is well settled that a court of equity will interfere and remove the inequitable obstruction. 'The equitable relief sought rests upon the fact that the execution has issued, and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation.'" After thus disposing of the point under consideration it is probably unfortunate that the court said *arguendo*, and, as will be plainly seen, somewhat outside the case, quoting the *obiter* remark in *Cornell v. Radway*, 22 Wis. 260, heretofore referred to, "Where the judgment of the plaintiff is by statute a specific lien upon the land without the issue or levy of an execution, it would seem that the plaintiff is entitled to the aid of the court, whether execution has been issued and returned unsatisfied or not," thus in a measure keeping up the uncertainty as to whether a judgment, standing alone, is a specific lien upon the real property of the judgment debtor which he fraudulently conveyed prior to its rendition, instead of its being a mere right to acquire a lien, which requires the issuance of an execution and an actual seizure of the property thereunder in order to ripen into such an interest in the *res* as will be recognized by a court of equity in an action to

remove a cloud thereon by the owner of such interest. It should be said that the remark referred to was good law as applied to the case, because the attempted conveyance of the property was absolutely void for want of authority to make it, though the decision was not very clearly placed on that ground.

In *Evans v. Laughton*, 69 Wis. 138, the property was seized under a writ of attachment. This proposition among other things was sufficiently involved to receive the attention of the court: Was the conveyance made to hinder and defraud creditors? the idea being that if such was its character no lien was acquired thereon by the attachment. On such proposition the court said, in effect, that, if it were to be decided in the affirmative, the judgment creditor would be at liberty, notwithstanding the conveyance, to seize the land on execution or attachment as the property of his debtor, and thereby acquire a specific lien at law which equity would lend its aid to protect.

In *Ahlhauser v. Doud*, 74 Wis. 400, an action in equity, by a judgment creditor to remove a cloud from his lien upon property fraudulently mortgaged and conveyed by the judgment debtor, was sustained solely upon the ground that the plaintiff had in fact acquired a specific lien on such property by a seizure thereof under an execution issued on his judgment. True it was there said that, "The fraudulent deeds and mortgages are absolutely void, and conveyed no estate to the grantees and mortgagee as against the claim of the plaintiff, and so the lien of the judgment and execution is perfect;" but it will be observed that the lien was spoken of as being created, not by the judgment, but as being single and created by the judgment and execution; and by a careful reading of the opinion it will be clearly seen that it proceeded to a conclusion on the theory that the fraudulent instruments were absolutely void only in the sense that they were void at the election of the judgment cred-

itor — that is, that they were voidable; that the term "absolutely void" was not appropriately used; that the title to the property was so affected by the fraudulent conveyances that without an actual seizure of it under an execution or attachment the creditor could not obtain a specific lien thereon but only the right to a lien; that upon such right being exercised by the specific act of election, to avoid the fraudulent transfers, of a seizure of the property, an actual interest therein was acquired, leaving such conveyances as mere clouds upon such interest, which equity would lend its aid to remove.

We have now reviewed the more important cases preceding *Gilbert v. Stockman*, 81 Wis. 602, and shown, it would seem, as regards anything actually decided therein, that they are all in harmony with the decision in that case and with what is here decided,— that is, that a judgment against a fraudulent vendor of real property, which has been duly docketed in the county where such real estate is located, does not of itself create a lien on such property, because the conveyance vests, in the fraudulent vendee, the title of his vendor, subject to the right of the defrauded creditors at their election to avoid it; that such creditor can only avoid the fraudulent transfer and obtain a specific lien upon the property covered by it by a seizure thereof under a writ of attachment or execution, or, after the exhaustion of all legal remedies to collect the debt without success, by an appeal to a court of equity to remove the impediment to the judgment attaching to the property; that in the absence of such seizure the judgment creditor has only the right to a lien upon the property fraudulently conveyed and to enforce such lien for the satisfaction of his debt, which right, being strictly legal, cannot be protected in equity till the creditor has first exhausted all his legal remedies to that end, as indicated; that when the right to a lien upon the property fraudulently conveyed ripens into a lien in fact by an actual

seizure of the property under attachment or execution, a court of equity will then lend its aid to free the lien from the cloud upon it created by the fraudulent conveyance.

Having disposed, adversely to the respondent, of the contention that its judgment and the docketing thereof in the county where the land in controversy lay created a specific lien upon the property, assuming that the prior conveyance thereof was void as to the creditors of the grantor because tainted with fraud, under sec. 2320, Stats. 1898, it is not necessary to decide the question, argued in the briefs of counsel, of whether the facts alleged in the complaint are sufficient to show that the deed was so tainted.

The only question left for consideration is this: Is the deed of an insane person, who has not been adjudged insane and placed under guardianship, merely voidable? If it is absolutely void, then, according to the complaint, the title to the property in question did not pass to *Theriault* by the conveyance under which he claims. In that event the respondent's judgment became a lien upon the property and the complaint shows a good cause of action in equity to remove the cloud upon such lien.

There is some conflict of authority in this country, and between the courts of this country and those of England, regarding the character of an insane person's deed. In England it is held that such a deed is absolutely void. *Ball v. Mannin*, 1 Dow & C. 380. There are a few authorities to the same effect in this country, most or all of which, upon careful examination, will be found to be quite undecisive and unsatisfactory. The text writers are in substantial accord that an insane person's deed conveys title to the grantee and is voidable only. Devlin, Deeds, § 73; 1 Washb. Real Prop. (5th ed.), 486; 2 Kent, Comm. 452; Kerr, Real Prop. § 2316; Pingree, Real Prop. § 1281; 1 Jones, Real Prop. § 52; 1 Story, Eq. Jur. §§ 222, 228; 11 Am. & Eng. Ency. of Law (1st ed.), 133. The only text writer that is out of line

is Beach. He states the law in accordance with the English doctrine in his late work on the Modern Law of Contracts, at § 1390, in a few words, without comment even to the extent of recognizing a conflict of authority on the subject. The only support for the text in the notes is a few New York cases, none of which supports it in fact, the leading case being *Van Deusen v. Sweet*, 51 N. Y. 378, to which further reference will be hereafter made. The most prominent case cited is one decided in the supreme court of New York, *Brown v. Miles*, 16 N. Y. Supp. 251, reported in the regular series of state reports in 61 Hun, 453. That is cited as a definite judicial declaration that the great weight of authority is to the effect that an insane man's deed is absolutely void. The writer of the opinion so says, citing, however, only a few New York cases, none of which in fact supports the doctrine to its full extent.

It is deemed proper to call special attention here to the careless manner in which the text above referred to was prepared, lest the profession be misled by it. It illustrates the danger of placing any great reliance on some of the modern text-books, and the importance of more care being exercised in their preparation.

In Devlin on Deeds [§ 73] the law is stated thus: "The deed of a person *non compos mentis* who is not under guardianship transfers a seisin and is merely voidable." That is supported by a large collection of cases from many states of the Union. In Washburn on Real Property [(5th ed.), vol. 1, p. 486] it is said that infants and insane persons not under guardianship are in the same class, substantially, in respect to their acts being voidable and not void. Both of the text writers specially referred to cite *Van Deusen v. Sweet*, *supra*, and *Farley v. Parker*, 6 Oreg. 105, which is based on the New York case, as exceptions to the great array of authority to which they call attention.

In *Van Deusen v. Sweet*, the court did not go to the extent

of holding that the deed of an insane person, though not under guardianship, is in all cases absolutely void. The decision was limited to cases where the insanity is of such a nature as to render the subject of it absolutely incompetent to act mentally in the transaction,— to persons so insane as to be wholly devoid of reason. It was said, in effect, that there is no doubt that a person may be insane and his mental unsoundness be of such a nature as to render his acts only voidable; that the mere fact of the insanity of the maker of a deed, regardless of the degree of insanity, is not sufficient to render the deed absolutely void if he is not, at the time of making it, under guardianship because of his infirmity.

There is strong reason for the idea that, if a person is so utterly devoid of mental power as to be totally incapable of comprehending the nature of his act in making a deed, or knowing that he is engaged in such a transaction, the instrument should be held to have no legal existence for any purpose. That is as far as the New York court has gone.

If we were to hold in accordance with *Van Deusen v. Sweet*, it would not save the complaint from condemnation as not stating a cause of action, for there is no allegation in it in regard to Lavoie's condition at the time he made the deed, except that he was insane. The degree of his insanity is not alleged. In *Aldrich v. Bailey*, 132 N. Y. 85, a complaint, held by the lower court, on the strength of *Van Deusen v. Sweet*, to state a good cause of action to avoid certain deeds as absolutely void, was condemned, without affirming the rule laid down in the *Van Deusen Case*, for want of allegations showing that the grantor of the deed was wholly without mental capacity. Though some twenty years had elapsed since the decision in that case, the court declined to say it was correctly decided, but said that, assuming its correctness, a complaint to annul the deed of an insane person not under guardianship is insufficient unless it shows that such person was absolutely and completely unable to understand

or comprehend the nature of the transaction. Other New York cases are in the same line. *Riggs v. Am. T. Soc.* 95 N. Y. 503; *Valentine v. Lunt*, 115 N. Y. 496.

Valpey v. Rea, 130 Mass. 384, is cited to our attention as holding that the deed of an insane person is absolutely void unless ratified by the grantor on recovering his reason. *Brigham v. Fayerweather*, 144 Mass. 48, should be added. However, they do not go to the length contended for. In the one case it is said that the deed of an insane person is ineffectual to convey the title to land "against the grantor or against his heirs and devisees *unless it is confirmed* by the grantor himself when of sound mind, or by his legally constituted guardian, or by his heirs or devisees." That language was repeated in the second case in connection with the following: "Such deed may be *disaffirmed*, without returning the consideration money or placing the other party *in statu quo*." A careful analysis of the quoted language must lead to the conclusion that the Massachusetts court came far short of holding what respondent contends. A thing that "may be made good by ratification," or is not so binding but that it may be "disaffirmed," it would seem, must be said to be voidable only. That such was the sense in which those terms were used appears conclusively by the fact that numerous early Massachusetts cases were referred to as having established the doctrine declared, in all of which it was distinctly held that the deed or contractual act of an insane person is merely voidable. For example, in *Carrier v. Sears*, 4 Allen, 336, it was said: "The contract of an insane person, or one obtained by fraud or duress, is voidable and not void." In *Gibson v. Soper*, 6 Gray, 279, after some other not very well considered remarks, it was said, *arguendo*, speaking of the insane person as the demandant, "The estate is still in the demandant; for if it passed, it passed by the deed of an insane man never ratified or confirmed. That, in law, is impossible." The court, how-

ever, referred to *Allis v. Billings*, 6 Met. 415, saying that it settled the law for Massachusetts that the deed of an insane person is voidable only. In the *Allis Case* the lower court instructed the jury that the deed was absolutely void. That was held error on the appeal, the court remarking: "The jury should have been instructed that this fact [of insanity], if established, rendered the deed voidable." Numerous other Massachusetts cases to the same effect might be cited.

If any further support were needed for the view that the late Massachusetts cases do not change the rule early laid down and affirmed in that court, it is furnished by *Hovey v. Hobson*, 53 Me. 451, where language is used similar to that in *Valpey v. Rea*, 130 Mass. 384, as regards ratification or confirmation being necessary to render an insane man's deed valid. What was meant by such language is clearly shown by the language of the decision, as follows: "The deed of an insane man not under guardianship is not void, but voidable," etc. "If under guardianship, the deed is absolutely void." A multitude of cases to the same effect might be cited. We will refer to only a few of them. *Castro v. Geil*, 110 Cal. 292; *Boyer v. Berryman*, 123 Ind. 451; *Nichol v. Thomas*, 53 Ind. 42; *Eaton v. Eaton*, 37 N. J. Law, 108; *Elston v. Jasper*, 45 Tex. 409; *Odom v. Riddick*, 104 N. C. 515; *Burnham v. Kidwell*, 113 Ill. 425; *Crawford v. Scovell*, 94 Pa. St. 48; *Gribben v. Maxwell*, 34 Kan. 8; *Allen v. Berryhill*, 27 Iowa, 534; *Burke v. Allen*, 29 N. H. 106.

Our attention is called to *Dexter v. Hall*, 15 Wall. 9, as holding to the contrary of the cases above cited. If counsel were right as to that case, we should hesitate before running counter to it on a new question in this court, unless there is such an overwhelming weight of authority against it as to clearly show that it is wrong. What is in fact decided in *Dexter v. Hall* is that a power of attorney made by an insane person is absolutely void. Reference is made to the doctrine of the English courts, that the deed of an in-

sane person is classed with such person's power of attorney, but the court recognized that there may well be a distinction between an insane person's power of attorney and his deed. It was said, as regards the character of the former, that the decisions in England and in this country are in harmony, but that as regards the character of the latter, whether voidable or absolutely void, there is considerable conflict and inconsistency. The decision of the court, however, was confined, as it necessarily had to be, to the question before it, and we are unable to find that the doctrine announced has ever been extended in that court to deeds. In *Johnson v. Harmon*, 94 U. S. 371, the subject was referred to, it being said that the deed of a person so bereft of reason as not to be able to distinguish between right and wrong is at least voidable.

There are cases where courts have reached the same conclusion, as to the scope of *Dexter v. Hall*, as that urged by respondent's counsel. For example, in *German S. & L. Soc. v. De Lashmutt*, 67 Fed. Rep. 399, decided in the circuit court for the district of Oregon, the following language is used: "Whatever difference of opinion once existed as to whether the deed of an insane person was void or voidable, the question is authoritatively settled that such deed is absolutely void," citing *Dexter v. Hall*, and *Farley v. Parker*, 6 Oreg. 105. The latter case, it will be remembered, merely followed *Van Deusen v. Sweet*, 51 N. Y. 378, to the effect that the deed of a person so insane as to be wholly bereft of reason is absolutely void, and *Dexter v. Hall* does not attempt to decide the question at all. In *Parker v. Marco*, 76 Fed. Rep. 510, decided in the United States circuit court for the district of South Carolina, Mr. Justice SIMONTON, who delivered the opinion, said that in *Dexter v. Hall* "the question before the court was whether the deed of an insane person was void or voidable. To that question the court directed its attention, and solved the doubts created by con-

flicting decisions in other jurisdictions, fixing the law in the federal courts, which was afterwards amplified by Mr. Justice CLIFFORD in *Johnson v. Harmon*, 94 U. S. 371." How very far that statement is from what was in fact decided in those cases is clearly indicated by what has been said. No attempt was made to harmonize conflicting decisions in this country. As indicated, the law as settled in England was referred to, also the inconsistencies in the adjudications of this country, as to deeds of insane persons, without expressing any decided opinion as to the right of the matter, and then the question presented for adjudication was decided in harmony with the decisions of the English courts and those of this country as well.

We have now carried the discussion of the subjects presented by this appeal to a considerable length, though no greater, probably, than their importance warrants. We received much assistance from the able briefs of counsel on both sides of the controversy, and have pursued our investigations to a satisfactory conclusion. On the first branch of the case we have shown, as it seems, that there is a substantial harmony in the decisions of this court, from the beginning, on the lines laid down in *Gilbert v. Stockman*, 81 Wis. 602, which are tied to the idea expressed in that case that the word "void" in sec. 2320, Stats. 1898, means voidable, and that the title to lands conveyed in fraud of creditors actually passes to the vendee, subject, however, to be divested at the election of any such creditor. On the second branch of the case we have shown that there is substantial harmony in the decisions of this country contrary to the law as held by the English courts, that the deed of an insane person is voidable, not void; that the exceptions to that doctrine are few in number and are either based on a misconception of the authorities on which they are grounded, or follow the lead of *Van Deusen v. Sweet*, 51 N. Y. 378, which goes no further, as we have shown, than to hold that

the deed of a person absolutely bereft of reason is absolutely void. We must hold that, at the time respondent's judgment was rendered, the judgment debtor did not have title to the land in controversy, hence that such judgment did not become a specific lien thereon, whether the deed to *Theriault* be considered as tainted with fraud under sec. 2320, Stats. 1898, or to be the deed of an insane person. In any event, the deed passed the title to the land to the grantee therein named, subject, however, to be divested according to law. Plaintiff not being possessed of a lien upon the land by virtue of his judgment, his right to enforce the judgment by execution did not survive the death of Lavoie, so no lien was acquired under the execution levy. The demurrer to the complaint, therefore, should have been sustained.

By the Court.— The order appealed from is reversed, and the cause remanded for further proceedings according to law.

CASSODAY, C. J., took no part.

CERNAHAN, Respondent, vs. CHRISLER, Appellant.

September 27 — October 12, 1900.

Conversion: Return of property pending suit: Damages: Mitigation: Tender: Costs.

1. Plaintiff purchased a horse and buggy of L., who delivered the property at a certain livery stable. L. having absconded leaving her children, their uncle came to town to get what property she left and employed defendant to assist him. Defendant, who was undersheriff, having discovered the property at the stable, directed those in charge not to allow any one to remove it, and thereafter returned with the uncle and directed the property to be delivered to him, which was done. Defendant was ignorant of plaintiff's ownership and, when he did learn thereof, offered to return the property,

which he did after suit had been commenced. *Held*, that defendant clearly exercised dominion over plaintiff's property in defiance of his rights, and was guilty of its conversion.

2. In such case, the defendant being answerable not only for the value of the property, but for any special damages the plaintiff had sustained, the return to the plaintiff of the property and its acceptance, or its retaking, pending the suit goes only to mitigate the damages, and not in bar of the action.

3. Where, in an action for conversion, the property is returned to and accepted by plaintiff pending the action, the defendant may protect himself against a judgment for the costs of the action, in case nominal damages only are finally recovered, by tendering judgment for nominal damages and costs up to the time of tender.

APPEAL from a judgment of the circuit court for Chippewa county: E. W. HELMS, Judge. *Affirmed.*

This action was brought in justice's court to recover for the conversion by defendant of a horse, buggy, and harness. The trial resulted in a judgment for plaintiff for six cents damages and costs. The case was appealed to the circuit court, and was tried and disposed of upon the justice's return of testimony. The judgment of the court below was affirmed. The following facts are shown by the record: Plaintiff purchased the property of Mrs. Lowe, a widow, who at his direction left it at a livery stable in the city of Eau Claire. Mrs. Lowe eloped, leaving several children. William Lowe, a brother of her deceased husband, took charge of the children. He came to Eau Claire to look up any property she may have left, and at his request the defendant, who was undersheriff, assisted him. The defendant found the property at the livery stable, and directed the persons in charge not to let any one have it. He returned soon afterwards with Mr. Lowe, and directed the livery-stable keeper to deliver the property to him, and it was taken away. He acted on the supposition that it belonged to Mrs. Lowe. The following day he was informed by the plaintiff that he owned the property. He replied that he had acted a little too quick in the matter, and that he would

have the horse brought in the next day. After the suit had been commenced, and before trial, Lowe brought the property back to the stable, and made claim for keeping of the horse. Plaintiff declined to pay, and took the property and sent it to his farm. There are other minor circumstances shown by the record tending to support the alleged conversion, but it is deemed unnecessary to state them in detail. Defendant brings this appeal.

The cause was submitted for the appellant on the briefs of *Wickham & Farr*, and for the respondent on that of *Frawley, Bundy & Wilcox*.

Counsel for the appellant contended, *inter alia*, that the defendant's acts complained of did not constitute a conversion. *Smith v. Schulenberg*, 34 Wis. 41, 50; 2 Greenl. Ev. §§ 642, 643; *Tinker v. Morrill*, 39 Vt. 477; *Gossler v. Wood*, 120 N. C. 69; *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; 4 Am. & Eng. Ency. of Law, 108, 109; 26 id. 735; *Bolling v. Kirby*, 24 Am. St. Rep. 796, note; Cooley, Torts, 448; Bryant's Justice, § 1212; *Smith v. Colby*, 67 Me. 169; *Gurley v. Armstead*, 148 Mass. 267; *Hodgson v. St. Paul P. Co.* 78 Minn. 172; *State v. Staed*, 72 Mo. App. 581; *Geo. H. Fuller D. Co. v. McDade*, 113 Cal. 360; *Steele v. Marsicano*, 102 Cal. 666; *Gillet v. Roberts*, 57 N. Y. 28; *School Dist. v. Zink*, 25 Wis. 636; *Tucker v. Housatonic R. Co.* 39 Conn. 447; *Fouldes v. Willoughby*, 8 Mees. & W. 540.

BARDEEN, J. Two questions are suggested by the record: (1) Does the evidence show that defendant was guilty of a conversion of the property sued for? (2) Was the taking of the property by plaintiff pending the suit a waiver of his cause of action for conversion?

1. We will first inquire what acts of a party constitute a conversion. Perhaps as terse a definition as can be found in the books is given in Cooley, Torts (2d ed.), 524. The learned author says: "Any distinct act of dominion wrong-

fully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." It is not necessary that there should be a manual taking, or that it should be shown that he applied it to his own use. The test is, Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights? If he does, that in law is conversion, be it for his own or another person's use. Neither is it any defense to say that he acted as agent. "But one who assists in a wrongful taking of goods is liable, though he acted as agent merely, for agency cannot be recognized as a protection in wrongs." Cooley, Torts, 529. Neither is the motive which controlled the party available as a defense, except, in cases where exemplary damages are claimed, it may be shown in mitigation. *Baltimore & O. R. Co. v. O'Donnell*, 21 L. R. A. 117, 49 Ohio St. 489; *Tobin v. Deal*, 60 Wis. 87. In view of these rules, it seems entirely unnecessary to discuss the evidence. The defendant clearly exercised dominion over the plaintiff's property in defiance of his rights. It does not serve to excuse him that he was ignorant of plaintiff's title, or supposed title was in Mrs. Lowe, or that he was acting in the interest of Mr. Lowe. We say, therefore, that there is evidence to support the plaintiff's cause of action.

2. After this suit was commenced the plaintiff took possession of the property, and it is now claimed by defendant that he waived his right to further prosecute his action. We are referred to *Collins v. Lowry*, 78 Wis. 329, as an authority sustaining that proposition. This was an action for the conversion of certain shares of stock. Pending the action the defendant brought such shares into court and tendered them to plaintiff. At the trial plaintiff announced his readiness to accept the stock, and thereupon introduced the stock certificate in evidence. He claimed also the right to recover damages for his time, trouble, and expense in attempting to secure a return of the stock. The court directed a verdict

for nominal damages. The recovery being less than $50, judgment for costs was entered for defendant. In this court the plaintiff insisted that he was entitled to recover for his expenses, etc. In denying a recovery under the circumstances, the following language was used: "The theory of the case is that the defendant is only answerable for the value of the property, and that he or his vendee or transferee is to be regarded as the owner. Such being the nature of the action, a verdict for the value of the property converted necessarily covers and includes the damages for such conversion, and the acceptance by the plaintiff of the thing converted necessarily covers and includes its value, and hence such acceptance extinguishes the alleged cause of action for such value. In other words, the plaintiff, pending such action, cannot waive the alleged tortious conversion by taking back the property, and at the same time continue the action and recover the full or partial value of the thing converted, not even to recover costs." It will be observed that no cases are cited to sustain this proposition. It is true that in actions for conversion of property the measure of damages is generally the value of the property at the time and place of the conversion, with interest; but, when the circumstances show special damage over and above the value of the property, the almost universal current of authority is that such damage may be recovered in such action.

This rule was recognized in *Churchill v. Welsh*, 47 Wis. 39, is incidentally referred to in *Ingram v. Rankin*, 47 Wis. 406, and is expressly stated in *Parroski v. Goldberg*, 80 Wis. 339. In *Churchill v. Welsh*, 47 Wis. 39, and again in *Warder v. Baldwin*, 51 Wis. 450, this court discussed the circumstances under which there may be a return of the property converted, in mitigation of damages, pending the suit. The conclusion arrived at was that in case of such return, and in the absence of evidence showing special damage, the recovery should be limited to nominal damages.

In *Farr v. State Bank*, 87 Wis. 223, the rule is again referred to and affirmed. It is there distinctly said that unless the plaintiff has suffered special damages, apart from the value of the property, the recovery must be limited to nominal damages, although in that case the return was made before the action was brought. It will be observed that the court speaks of the return of the property as being in *mitigation of damages* and not in extinguishment of the cause of action. This seems to be the rule everywhere, as will be seen by reference to the following authorities: Cooley, Torts (2d ed.), 535, note 1; 2 Addison, Torts,* 513, § 534; 2 Jaggard, Torts, 720; *Walker v. Fuller*, 29 Ark. 448 (where it is explicitly stated that, although the plaintiff could not recover the full value of the goods after retaking them, yet the receipt back of the goods alone would not bar the action; the fact should have gone in mitigation of damages); *Greenfield Bank v. Leavitt*, 17 Pick. 1 (where it is said, "It is also well settled that, if the property for which the action is brought be returned to and received by the plaintiff, it shall go in mitigation of damages"); *S. C.* 28 Am. Dec. 268, and note. The case of *Bigelow Co. v. Heintze*, 53 N. J. Law, 69 contains an extended discussion of the question. The court there says: "In trover the cause of action is complete upon proof of the conversion. The return of the property is no bar to the action, but is admissible in mitigation of damages."

Many other cases might be cited, but to do so would incumber the record. The rule is universal, and rests upon the ground that the return of the property does not extinguish the cause of action, but simply goes in mitigation of the damages.

It being established in this state that special damages may be recovered in actions of this kind, the infirmity of the rule stated in *Collins v. Lowry*, 78 Wis. 329, becomes apparent. The theory of the case is not that "the defendant is only

answerable for the value of the property." He is answerable, not only for the value of the property, but for any special damage the plaintiff has sustained. Hence a return or retaking of the property goes only to mitigate the damages, and not in bar of the action. In the case at bar, however, no special damages are shown. In *Hiort v. L. & N. W. R. Co.* 4 Exch. Div. 188, 195, BROMWELL, L. J., said: "A conversion cannot be purged, and if a defendant is guilty of conversion he must pay some damages. A return of the goods undoubtedly might be shown, to reduce the damages, in the case of conversion, not only when the owner voluntarily received back the goods, but when he took them back against his will. In an action of trover and conversion, the practice was for a defendant to apply to the court for a stay of proceedings on a delivery up of the goods, and on payment of nominal damages and costs; but if the plaintiff refused to accept delivery, and insisted on proceeding with his action for substantial damages, he did so at his peril, and if he failed to get substantial damages he was made to pay the costs of the action. It is clear, therefore, that on a return of the goods the plaintiff would recover, not their value, but the damages he had sustained by the wrongful act, which was called the conversion." The rule above suggested, when a return of the property had been had, of applying to the court to stay or dismiss the action upon tender or payment of nominal damages and costs, was referred to and approved in *Bigelow Co. v. Heintze, supra*, and is one that furnishes ample protection to the defendant. It is certainly against the policy of the law to permit parties to carry on litigation when only the question of costs is involved. The case of *Geiser T. M. Co. v. Smith*, 36 Wis. 295, however, does not quite strike the situation here presented. There the payment of the note in suit extinguished the entire cause of action, and the court held there could be no judgment for costs without a judgment for damages. Here the plaintiff

was entitled, at least, to a judgment for nominal damages, which was a sufficient foundation to carry costs. The defendant might easily have protected himself by setting up the facts in his answer, and tendering payment of nominal damages and costs, as hereinbefore suggested.

By the Court.— The judgment of the circuit court is affirmed.

CASSODAY, C. J., took no part.

DOROTHY, Appellant, vs. RICHMOND, Respondent.

September 27 — October 12, 1900.

Appeals from justice's court: Trials de novo: *Review of orders of justice of the peace.*

Where a plaintiff has appealed from a final judgment rendered in justice's court, dismissing the action for noncompliance with an order requiring security for costs, and made the affidavit entitling him to a new trial, the filing of the record in the circuit court gives pendency to the action in that court, where it is entitled to a trial on the merits, and the propriety or impropriety of the justice's action in ordering security for costs, or dismissing the action for noncompliance with such order, is not the subject of review.

APPEAL from an order of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Reversed.*

Plaintiff sued defendant in justice's court upon a contract demand of $100. Upon appearance of the parties, security for costs was demanded, and ordered by the justice, and peremptorily refused by the plaintiff, whereupon the action was dismissed. Plaintiff, within the time limited by law, gave due notice and affidavit for appeal to the circuit court for Polk county, accompanied by an affidavit for trial *de novo*, in compliance with sec. 3768, Stats. 1898. At the

first term after filing the return on said appeal, namely, on the 12th day of September, 1899, with no intermediate steps of record, an order was entered dismissing the appeal, with $10 costs, from which order the plaintiff appeals.

The cause was submitted for the appellant on the brief of *H. P. Burdick*, and for the respondent on that of *Nils P. Haugen*.

DODGE, J. The case of *Steinam v. Schulte*, 83 Wis. 567, is conclusive of the question here presented. The plaintiff had appealed from a final judgment, and made affidavit entitling him to a new trial, so that the question of the propriety or impropriety of the justice's action in ordering security for costs, or in dismissing the action for noncompliance therewith, was not the subject of review. Upon the appeal being perfected in the manner prescribed by the statute, the filing of the record in the circuit court gave pendency to the action in that court, where it was entitled to a trial on the merits. The considerations urged by respondent, of hardship to him, are matters for the legislature, but cannot justify disobedience of their behests by the court. If security for costs was necessary to defendant's protection, he had an easy remedy, by application to the circuit court, under sec. 2942, Stats. 1898.

By the Court.— The order appealed from is reversed, and the cause remanded for further proceedings according to law.

CASSODAY, C. J., took no part.

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THE STATE EX REL. BOYCOTT, Appellant, vs. THE MAYOR AND COMMON COUNCIL OF LA CROSSE and another, Respondents.

September 6 — October 30, 1900.

Municipal corporations: Amendment of charter: Adoption of portions of general city charter law.

Under sec. 926, Stats. 1898, any city, incorporated under a special charter, is authorized to adopt, by ordinance, the provisions of any chapter, subchapter, section, or subdivision of a section of the general city charter law (ch. 40*a*, Stats. 1898), as an addition to or in lieu of provisions of its charter. Subch. XVIII of ch. 40*a* (secs. 925–172 to 925–200), entitled "City Improvements," relates, among other things, to the establishing and recording of grades for streets; the proceedings to be taken for their improvement, including the raising of the necessary funds therefor; and the assessment of benefits and damages to the abutting lot owner upon the alteration of an established grade, or the doing of any work on the streets at the expense of the real estate benefited, with right of appeal to the circuit court. The common council of La Crosse, a city incorporated under a special charter, by ordinance, adopted sec. 925–175 and secs. 925–177 to 925–197, leaving out the other sections of subch. XVIII. Sec. 925–173, one of the omitted sections, requires the establishment and recording of the grade of *all* streets, and prohibits work thereon until such grade is established and recorded, and its provisions do not appear, either in form or substance, in any part of the special charter of La Crosse. *Held*, that the omission of sec. 925–173 was a substantial and material change in the law as passed by the legislature, and therefore fatal to the validity of the ordinance.

APPEAL from a judgment of the circuit court for La Crosse county: R. G. SIEBECKER, Judge. *Reversed.*

This is an action of *certiorari* brought in due time, under the provisions of ch. 165, Laws of 1899, to test the validity of the attempted adoption by the common council of the city of La Crosse of certain sections of ch. 40*a* of the Statutes of 1898, being what is known as the general city charter law. The city of La Crosse is a city incorporated under a special charter, viz. ch. 162, Laws of 1887. On the 13th day of April, 1900, the common council attempted by ordinance

to adopt certain sections of subch. XVIII of said ch. 40*a;* the adoption being made under that part of sec. 926, Stats. 1898, which authorizes cities incorporated under special charters to adopt by ordinance the provisions of any subchapter, section, or subdivision of a section of chapter 40*a*, in addition to or in lieu of the provisions of its special charter. Subch. XVIII aforesaid is entitled "City Improvements," and is intended to govern that subject. Its sections are numbered from 925–172 to 925–200, inclusive. The ordinance in question attempted to adopt sec. 925–175 and secs. 925–177 to 925–197, inclusive, leaving out secs. 925–172, 173, 174, 176, 199, and 200.

In order to understand the questions involved, it will be necessary to state the contents of the various sections of subch. XVIII aforesaid, either at length or in substance, and such statement is as follows:

"Sec. 925–172. The council shall have authority to establish the grade of all streets and alleys in the city, and to change and re-establish the same as it may deem expedient; provided, that whenever it shall change or alter the permanently established grade of any street any person thereby sustaining damages to his property on such street shall have a right to recover such damages in the manner set forth in this subchapter.

"Sec. 925–173. The grade of all streets shall be established and described, and the adoption of such grades and all alterations thereof shall be recorded by the city clerk. No street shall be worked until the grade thereof is established and recorded in the manner herein set forth.

"Sec. 925–174. The streets shall be divided into a carriage way and a sidewalk on each side thereof; the sidewalk shall be for the use of persons on foot, and no person shall be allowed to incumber the same with boxes or other material; but such sidewalk shall be kept clear for the uses specified herein.

"Sec. 925–175. The city may cause streets and alleys to be opened, leveled, graded, regraded, graveled, regraveled, macadamized, paved and repaved with stone, wood or other material or improved in any other manner, and may cause such streets and alleys to be swept, sprinkled and cleaned; but no street shall be graded, graveled, paved, macadamized or improved, where the expense exceeds five hundred dollars, except upon the vote of two thirds of the members of the council elect. The expense of such work or improvement may be paid in whole or in part by the city or by the property to be benefited thereby, as the council shall direct, but in no case shall the amount assessed to any parcel of real estate exceed the benefit accruing thereto by such improvement, except in case of sidewalks; provided, that where work is ordered to be done and the expense thereof is made chargeable to particular property the city shall in no case be responsible for the payment therefor except in cases where the cost of the improvement exceeds the benefits.

"Sec. 925–176. In any city whenever the owners of more than one half of the frontage of the lots upon that part of any street proposed to be improved shall petition the common council to improve such street or part of street by stone paving, macadam or otherwise as set forth, to be made in such manner as shall be fully specified by the city surveyor and approved by the mayor, and upon advertisement setting forth clearly such specifications, such city may contract for such work to be done by the lowest responsible bidder if deemed reasonable in cost, or in case of macadam it may have the work done by men in the employ of the city; provided, that such improvement, unless made to connect with streets somewhat similarly improved, shall be made to extend upon such street not less than the length or width of three blocks of lots and the street crossings between. The cost of such improvement when made shall be assessed to the respective owners of the lots fronting on such street in the

ratio of each owner's number of feet front to the entire length of such improvement, exclusive of street crossings, which shall be chargeable to the city as its proportion of expense, and such crossings shall be made to conform with the street so improved. The word street as herein used may be construed to mean two or more streets when the whole taken together would form one continuous drive."

Sec. 925–177 provides for the construction of cross walks and the repairing of streets, to be paid out of the city or ward funds. Secs. 925–178 to 925–185, inclusive, contain specific provisions for the assessment of benefits and damages upon the alteration of any established grade or the doing of any work upon any streets at the expense of real estate benefited, and provide for an appeal to the circuit court from such assessment, which is declared to be the only remedy of the property owner for the redress of any grievance by reason of the making of the improvement or of a change in any established grade. Sec. 925–186 provides for the methods of advertising for bids for the work. Sec. 925–187 gives power to reject bids. Secs. 925–188 and 925–189 provide for the execution of certificates against the lands benefited, to contractors, and specify that such certificates shall be conclusive evidence of the legality of the proceedings after the expiration of nine months from their date, and also provide for the insertion of the amounts thereof in the tax roll. Sec. 925–190 provides that a contract for street improvements may provide that the amount chargeable by way of benefits may be paid with certificates against lots or in special improvement bonds, or in the proceeds of the sale of such bonds. Secs. 925–191 to 925–197*a*, inclusive, contain general provisions authorizing the issue and execution of special improvement bonds, and the effect of such bonds when executed, and the method of foreclosure thereof. There is no section 925–198. Secs. 925–199 and 925–200 provide that, until a board of park commissioners shall be provided

for, the public parks of the city shall be in charge of the board of public works, and that the common council of the city shall have full power to legislate for public parks, subject, however, to the proviso that the question of the establishment thereof be first decided in the affirmative by vote of the electors of the city.

These facts appearing upon the return of the writ of *certiorari*, the proceedings of the common council were affirmed by the circuit court, and the relator appeals.

For the appellant there was a brief by *McConnell & Schweizer*, and oral argument by *J. E. McConnell.*

W. F. Wolfe, for the respondents.

WINSLOW, J. The facts in the present case are similar to those presented in the case of *Adams v. Beloit*, 105 Wis. 363, with the important difference that in the *Adams Case* the ordinance of adoption included the whole of subch. XVIII, set forth in the statement of facts, except sec. 174, whereas the ordinance attacked in the present case omits secs. 172, 173, 174, 176, 199, and 200.

The conclusions reached in the *Adams Case* were, in substance, that the statutory provision authorizing a city acting under a special charter to adopt a part of the general charter law is valid, at least as applied to the adoption of an integral part of the law, complete in itself; that this is option legislation, uniform in its operation, and is not special legislation, although the option is confined to a class. The discussion of the general subject in that case was the result of the fullest consideration which we were able to give it, assisted by very complete and able arguments. We have seen no reason to re-examine the positions there laid down, nor were we asked to do so in the present case. Counsel for the appellant in the present case accept the result reached in the *Adams Case*, but contend that the attempt has been made here to adopt only a fragment of a law, and to leave out important sections which are essential parts of the scheme

for city improvements as enacted by the legislature, and that this cannot be legally done under the well-established principles applicable to option legislation. This contention presents for consideration serious and interesting questions. The principle that an option law, in order to be valid, must be a complete law in all its terms and provisions, when it leaves the legislative branch of the government, so that nothing is left open, save the determination of the prescribed fact upon the happening of which it is to go into effect, is so well settled as to require no discussion. It must be a complete law in all its details *in præsenti*, but may be left to take effect *in futuro*. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63. Any other rule would result in a practical delegation of legislative power. If the governing body of a municipal corporation can take such parts as it chooses from a complete law, and reject such parts as it chooses, the result will be, not the law which the legislature has enacted, but a law which the corporation has enacted. In such a case the legislature has never said that the parts chosen by the corporation should constitute a law, standing by themselves, but the governing body of the corporation has said so. This must be legislation, or it is nothing; and, if it be legislation, it is legislation by the municipal corporation, and not by the legislature. It may be said that this view is inconsistent with the result reached in the *Adams Case*, but we think not. In that case it was, in effect, held that a part of the general charter governing a particular subject, and which was complete in itself, might and should be considered as a separate and complete law upon the statute book, and thus might legally come under the general principle sustaining option legislation. It may be that the rule adopted in that case carried the doctrine by which option legislation is sustained to the limit, but it must be remembered that when laws are attacked as unconstitutional the courts will go as far as possible, consistent with reason and sound legal principles, to sustain the laws. In that case the whole of subch. XVIII, except

sec. 174, was adopted, and it was deemed the adoption of a complete law on the subject of city improvements; the omission of sec. 174 not being regarded as important, and the question as to the effect of its omission not having been raised or argued in the case. Indeed, the provision of sec. 174 would seem to add nothing to the law, for the reason that its provisions are simply a reaffirmation of provisions either expressly or impliedly contained in every municipal charter, and which have been universally applied from time immemorial.

In the present case, however, a number of additional sections were omitted; and the question is whether it can be said, in view of these omissions, that the council has exercised a valid option by accepting a complete law as it left the legislature, or has it attempted to accept a part only of a law, and thus in effect legislated for itself? The legislative scheme for the construction of city improvements, as disclosed by subch. XVIII, may be briefly stated as follows: The power to establish and change grades is vested in the council, with the proviso that any property owner damaged by the change of an established grade shall be entitled to recover such damages. The council are required to establish grades and cause them to be recorded in the clerk's office, and no street can be worked until after the establishment and recording of the grade. Streets may be graded, paved, or improved by vote of the council, and the expense, either in whole or in part, paid by the city, or the property benefited; but no assessment of benefits shall exceed the actual benefit, except in case of sidewalks. When the owners of more than one half the lots fronting on a street shall petition for a specified pavement, approved by certain officials, such paving may be done, and the expense charged against the abutting lots by the front-foot rule. Cross walks and repairs shall be paid for out of city or ward funds. The benefits and damages resulting from change of established grade or from any street work to be done at the expense of

property benefited shall be assessed and fixed by the board of public works, subject to final review and correction by the council. A landowner may appeal from such assessment, and the remedy by appeal is exclusive. Bids for the work shall be secured in a specified way, and contractors shall be paid either in certificates, improvement bonds, or cash, as determined by the council. Improvement bonds may be issued at the option of lot owners, with certain specified characteristics and legal effect.

So far as necessary for the present purpose, the foregoing may be said to be the substance and effect of the law governing street improvements as it left the legislature. Can this be said to be the substance and effect of the law which the council of the city of La Crosse attempted to adopt? We think this question must be answered in the negative.

It may be granted that the city had and still has power, under its special charter, to establish and change grades, so that the failure to adopt the first clause of sec. 172 is immaterial. Leaving this omission, therefore, out of consideration, we find that the council has attempted to eliminate from the law passed by the legislature (1) the provision that a property owner may recover his damages for a change of established grade; (2) the requirement that the grade of *all* streets shall be established and recorded; (3) the prohibition against the working of any street until the grade is established and recorded; (4) the provision allowing the owners of more than one half the frontage on a street to cause the street to be paved, and paid for by assessments on abutting lots under the front-foot rule. With these substantial omissions, we do not see how it is possible to say that any complete law passed by the legislature, governing street improvements, has been adopted by the council. It was argued that the omission of the proviso in sec. 172 giving a property owner the right to recover damages for a change of established grade is immaterial, because all the legal machinery for the recovery of such damages is contained in

secs. 178 *et seq.* of the chapter, and that these latter sections were all adopted by the ordinance. Admitting (but not deciding) that this contention may be sound, what can be said which will excuse the omission of sec. 173, which requires the establishment and recording of the grade of *all* streets, and prohibits the working of any street until its grade is established and recorded? Here is a positive requirement, which the legislature deemed an essential part of the system, which has been dropped out by the council, and which does not appear, either in form or in substance, in any part of the special charter of the city of La Crosse. It cannot be called trivial or unimportant. It was evidently framed to secure to the property owner the right to have a permanently established grade fixed, and recorded where he can examine it, before any work be done on the street, or assessments made against his property. Without this provision, the council might actually work the street and change its surface up or down as many times as they chose, and levy assessments therefor every time, and the property owner would have no redress for the change of actual grade, so long as the council had not permanently established a grade. This seems to be the very thing that the legislature intended to guard against,— the safeguard which the property owner was intended to have,— and it is the very safeguard which the council have denied him. The legislature have said that he should have it. The council have said he should not have it. This is not the exercise of an option on existing legislation. It is legislation itself.

Regardless of the effect of the elimination of sec. 176 (which is also a serious question), we cannot but regard the omission of sec. 173 as a substantial and material change in the law as passed by the legislature, and hence fatal to the ordinance.

We are not unmindful of the importance of the question presented, nor of the probable far-reaching effects of this ruling, and for those reasons have given the case most care-

ful consideration. As a result of this consideration, the conclusions reached seem inevitable and free from all reasonable doubt, and, such being our conclusions, we should fail in our duty, did we not declare them.

By the Court.— Judgment reversed, and action remanded with directions to reverse the proceedings of the city council by which the ordinance was adopted.

MARSHALL, J. With the conclusion reached in this case, notwithstanding some misgivings as to its correctness, I concur because I cannot see that a different result can be reached with sufficient clearness to overbalance the weight which an associate justice should give to the opinions of his companions on matters that admit of a reasonable doubt as to their proper solution. I write this opinion because of a grave question which, in one view of the case, is involved, that has never been decided by this court or presented for its consideration. Without expressing any decided opinion in regard to the question at this time, I am inclined not to allow the case to pass in such a way that it may hereafter be said that the point was not thought of. Before this court shall be called upon to decide such question the public interests demand that it be fully presented at the bar by able counsel. It is one so far-reaching as to call for the best efforts of the most eminent counsel and the most careful judicial study by the members of this court in order to arrive at a correct conclusion.

Neither *Dowling v. Lancashire Ins. Co.* 92 Wis. 63; *In re North Milwaukee*, 93 Wis. 616; *State ex rel. Adams v. Burdge*, 95 Wis. 390; *Adams v. Beloit*, 105 Wis. 363, nor any case found in our Reports on the subject of the constitutional power of the legislature to delegate authority to say when and under what conditions a law shall take effect, rules this case. The power to make laws, strictly so called, using the term in its general sense, being vested exclusively in the senate and assembly by the constitution, obviously, any at-

tempt to delegate it to any other body or governmental instrument would be void. Upon that principle, in *Dowling v. Lancashire Ins. Co.*, a delegation of authority to the commissioner of insurance to make a law, in *State ex rel. Adams v. Burdge* an attempt to delegate such authority to the state board of health, and in *In re North Milwaukee* a like attempt, so held, to delegate power to the circuit courts, were considered, and the legislation condemned. Each of such cases was unquestionably decided right if the principle of undoubted soundness referred to was correctly applied. There is no room for controversy but that the legislature may make a law and clothe municipal bodies with power to say when it shall take effect in their respective corporate communities. Upon that principle *Adams v. Beloit* was decided. The two principles mentioned were supposed, by the counsel who presented this case to the court below and argued it here, to necessarily govern the same. No other idea seems to have been thought of. The case was decided in the court below with that view and has been likewise decided here.

Has not the full scope of sec. 32, art. IV, of the constitution, been overlooked, and does it not expressly authorize the delegation of power to amend special city charters? That is the question to which I have referred. Sec. 1 of such article says that the legislative power of the state shall be vested in a senate and assembly. That obviously limits the power to make general laws to the supreme legislative body, but it may constitutionally intrust to local governing bodies power to legislate as to their local affairs independent of sec. 32, art. IV. That has never been doubted. Cooley, Const. Lim. 226; 3 Am. & Eng. Ency. of Law (1st ed.), 698. In applying the principle that legislative power cannot be delegated, one must distinguish between general laws and mere local regulations. *Metcalf v. St. Louis*, 11 Mo. 102; *Markle v. Akron*, 14 Ohio, 586, 590; *Covington v. East St. Louis*, 78 Ill. 548; *Stilz v. Indianapolis*, 55 Ind. 515; *Kelly v. Meeks*, 87 Mo. 396, 401.

So it seems that if the act of the common council of La Crosse cannot be sustained as a legitimate exercise of authority to say when a law shall take effect, we should inquire as to whether it is sustainable as a local regulation, or as an administrative act, under a power intrusted to inferior legislative bodies by constitutional authority. In that, in addition to the accepted doctrine referred to regarding the making of mere local regulations, we must turn to secs. 31 and 32, art. IV, of the constitution. Sec. 31 expressly prohibits the legislature from enacting special or private laws in certain cases specified, one being for the incorporation of any city, town, or village or amending the charter thereof. If that section and sec. 1 of article IV exclusively govern the subject, obviously the things prohibited cannot be done at all except in so far as they are proper subjects of local legislation or administration under general laws according to the principle heretofore referred to, or by option laws. But sec. 31 is but one of two parts of the change in the constitution from its original condition, the two parts being dependent upon each other. They were coupled together and adopted under such circumstances as to clearly indicate that neither would have been approved without the other. It required the entire change in the constitution to express the idea which the people had in mind as to the matter referred to. The additional provision is contained in sec. 32 as follows: "The legislature shall provide general laws for the transaction of any business that may be prohibited by section 31 of this article, and all such laws shall be uniform in their operation throughout the state." One can but note the significance of the words "shall provide general laws for the transaction of any business that may be prohibited," etc. Can that be accomplished without the delegation of authority to some governmental instrument or instruments to do the things prohibited? We have not yet been able to answer that question satisfactorily in the affirmative having in mind a method.

The idea expressed in sec. 32 is plainly not that the legislature shall, by general laws, do the things prohibited, but that it shall pass general laws of such a character that other appropriate bodies—boards, councils, or courts—*may, in the exercise of their authority, do the prohibited things.* In harmony with that idea general laws were passed immediately after the change in the constitution which, with those already in existence, furnished methods of doing everything mentioned in sec. 31. The power to change names was vested in circuit courts. Sec. 3520, Stats. 1898. The power to constitute one person the legal heir of another was vested in the same tribunals. Sec. 3521, Stats. 1898. The power to lay out highways was vested in town boards and other corporate bodies having charge of local affairs. Ch. 52, Stats. 1898. The power to grant ferry franchises was vested in county boards. Ch. 53, Stats. 1898. The power to authorize a sale of lands of persons under disability was vested in the circuit courts. Ch. 151, Stats. 1898. The power to locate or change county seats was vested in the people of the respective counties to be exercised under certain specified conditions. Sec. 655, Stats. 1898. The power to extend the time for the collection of taxes was vested in town boards and in city and village councils. Sec. 1108, Stats. 1898. The power to create private corporations was given to any three adult residents of this state who might desire to exercise it for any of the purposes mentioned in the statute upon their complying with the statutory conditions. The power to amend private corporate charters was vested in the stockholders of the corporations. Ch. 86, Stats. 1898, particularly secs. 1771 to 1774. The power to apportion the state school fund was vested in the state superintendent of public instruction. Ch. 28, Stats. 1898. That of determining the existence of conditions requisite to the incorporation of villages, in effect granting village charters, was vested in the circuit courts. Ch. 40, Stats. 1898. The power to substitute the general city charter for special city charters was vested in city

councils. Sec. 925–3, Stats. 1898. The power to amend city charters as regards ward boundaries was vested in city councils. Sec. 925–14, Stats. 1898. That of extending corporate limits by adding territory less than that included within the limits of a town, city, or village was vested in the councils. Sec. 925–17, Stats. 1898. That of adding to a city the entire territory of an adjacent city, town, or village, was vested in the governing bodies of the respective corporations. Sec. 925–18, Stats. 1898. *The power to amend special city charters as to any idea covered by the general city charter was vested in the city councils to be exercised in each case by the adoption by such councils of any chapter, subchapter, section, or subdivision of a section of such general charter covering such idea.* Sec. 926, Stats. 1898.

Is there a difference between power to amend the charter of a private corporation and that to amend the charter of a municipal corporation? Is not one the exercise of power to make law as much as the other? I have not yet been able to answer those questions in the negative. It would seem that, among the general laws to which we have referred, are several delegations of power exercised exclusively by the legislature acting directly in each particular instance before the constitution was amended. How can the doing of those things now, by municipal bodies authorized thereto by general laws, be the exercise of legislative power, since the legislature no longer has such power? If it has the power to delegate authority generally to cities to amend their charters, that power to delegate cannot be delegated. But how does that militate against cities administering, as to their respective charters, a delegated power, vested in them under the constitution, to change such charters? If the legislature may intrust to city councils power to do the business of amending their charters, obviously acts in that regard have the force of law. They are laws to all intents and purposes the same as if made by supreme legislative authority.

Now, how can we say the legislative method of amending city charters is inherently imperfect, if it even goes as far as we have suggested, since the legislature, under the constitution, is clothed with unlimited discretion as to the method to be adopted? It will be observed that there is no limitation in that regard, except that the general scheme adopted for doing things which can no longer be done by special legislative enactments must be uniform throughout the state. If the delegation of authority by a general law, to an inferior legislative tribunal, to do one of the things prohibited, be in effect a delegation of authority to make law, does that condemn it in view of the unrestricted command of the constitution? And why is the exercise of such authority the exercise of any power vested in the legislature, since such authority cannot be exercised by the senate and assembly?

Many instances might be mentioned where legislative functions have commonly been exercised in local matters, both before and since the amendment of the constitution, by the governing bodies of municipal corporations. Significant among them is the granting of franchises. Such grants have uniformly been upheld and said to be in effect acts of supreme legislative authority done through legitimate legislative agents. *Ashland v. Wheeler*, 88 Wis. 607; *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 620; *State ex rel. Att'y Gen. v. Portage City W. Co.*, *ante*, p. 441.

The foregoing illustrations are not deemed delegations of power to make law, strictly so called, but of power to execute or administer law. The administrative acts relate back to and receive force as law from the supreme legislative head. The supreme authority is sufficiently exercised when it intrusts to another body power to do the thing in the particular instance. The result of the exercise of such authority is no more than an administrative act or special regulation or provision, but with the same force and effect as a special

legislative act when power to so legislate exists. *State ex rel. Childs v. Darrow*, 65 Minn. 419.

In the adoption of the amendments to the constitution referred to, there was evidently no intention to do more than to limit the method of doing the things mentioned, taking away from the legislature the power to do such things by special legislation and requiring the adoption of laws enabling the doing of them without any resort to the legislature in particular instances. Now the legislature, pursuant to the constitutional amendment, having devised a scheme for the amendment of special city charters, no reason is perceived why it cannot be followed, regardless of whether it contemplates indirect special legislation. Obviously, any attempt to amend a city charter not in accordance with the legislative plan is void. The plan that has been adopted is to intrust the common councils of cities having special charters with power to amend them by adopting a chapter, subchapter, section, or subdivision of a section of the general city charter law. If that means that a part of the general charter law may be added to a special charter, though it cover but an idea which in the general law is combined with others covering an entire subject of municipal affairs, why it is not constitutional to its full extent as well as if it allowed only the adoption of an entire legislative scheme, under the option law principle, is not readily answered so as to support a theory contrary to that here suggested.

Enough has been said to bring out clearly the idea that the constitution expressly authorizes and commands the legislature by general laws to intrust to some agency the power to do each and every thing which it cannot do directly by reason of sec. 31, art. IV, of the constitution; that one of those things is the amendment of special city charters; that an amendment so made, though having the force of law, is in itself a mere executive or administrative act; and that it is a fair question as to whether the act challenged in this case may be sustained if the legislative plan for changing spe-

cial city charters has been followed, regardless of the option law doctrine which ruled *Adams v. Beloit*, 105 Wis. 363.

Applying the foregoing to the case in hand, and assuming all the power suggested to exist in city councils, I am unable to say that the legislative plan for amending respondent's charter was followed. The difficulty grows out of the omission to adopt sec. 925–173, Stats. 1898. The idea expressed in such section is by its express language impliedly carried forward and made a proviso to every other section. By its omission, the adoption of other sections did not adopt a single idea expressed by the legislature upon the subject of street improvements. The omitted section prohibits any street from being worked till its grade shall have been established, described, and recorded as provided in the scheme for street improvements which follows. We cannot say that any legislative idea in the entire scheme is complete without a recognition of sec. 925–173. In that view, whether the validity of the action of the common council be tested by the option law doctrine or by the theory that the legislature is not limited to that method of authorizing amendments to special city charters, the result is the same.

In this and all other cases where the question of amending special city charters since the adoption of the amendment to the constitution has been presented to this court, great significance has been given to a supposed constitutional policy to prohibit special changes in city charters, and to bring all such charters into harmony with each other. A moment's reflection will lead to the conclusion that there was no such intent as to special city charters. They were not abolished. It was contemplated that they would remain in force, that power to change them would be preserved, and that some general plan would be adopted by the legislature for its exercise. The idea was not to prohibit changes in such charters, but to prohibit changes by special legislation, and to provide generally some other method of making such changes.

INDEX.

ABATEMENT of action. See VOLUNTARY ASSIGNMENT, 5.

ABUTTING OWNERS. See CONSTITUTIONAL LAW, 1. PARTIES, 1. STREET RAILWAYS.

ACCEPTANCE.
Of dedication. See HIGHWAYS, 5, 6.
Of deed. See MORTGAGES, 2.
Of plans and specifications. See LIENS, 8.

ACCORD AND SATISFACTION. See SETTLEMENT.

ACCOUNTING. See APPEAL, 15. MORTGAGES, 1, 2. REFERENCE.

ACCOUNTS of assignees. See VOLUNTARY ASSIGNMENT, 5, 6.

ACTION.

Cause of action. See ACTION, 1–5. GUARDIAN AD LITEM. LIMITATION OF ACTIONS. MUNICIPAL CORPORATIONS, 5, 6. VOLUNTARY ASSIGNMENT, 5.

Conditions precedent. See BUILDING AND LOAN ASSOCIATIONS, 7. SURETYSHIP.

Election between remedies. See ACTION, 2. BUILDING AND LOAN ASSOCIATIONS, 6.

Limitations. See LIMITATION OF ACTIONS.

Subject of action. See ACTION, 2, 3–5.

Joinder of causes of action.

1. The joinder of an unpaid balance due plaintiff for labor and materials furnished the partnership of which he was a member, with the claims of plaintiff against the firm as a partner, if improper, is waived by failure to seasonably object on that ground. *Smith v. Putnam,* 155

2. In an action to recover from a decedent's estate damages for the unlawful sale by decedent of lands deeded to him by plaintiffs under a contemporaneous written agreement of decedent to reconvey on payment of a stipulated sum and interest, the sole primary subject of the litigation is the alleged indebtedness of the estate to the plaintiffs, and the question, therein presented for adjudication, as to whether the two instruments constitute a mortgage, is a mere incident of the primary right sought to be vindicated. A motion to require plaintiffs to elect on which cause of action they would rely is therefore properly overruled. *Jordan v. Estate of Warner,* 539

3. The test of whether more than one cause of action is stated in a complaint is whether more than one principal subject of action or primary right is presented by the pleading for adjudication. *Adkins v. Loucks,* 587

4. In an action to enforce the right of a creditor to payment of his claim against the estate of a deceased person out of the property of such person in the hands of his heirs under sec. 3274, Stats. 1898, a fraudulent vendee of such property is a proper defendant, and likewise is a third person who participated in the fraud and is in possession of the fruits thereof for the vendor. *Ibid.*

5. In the circumstances last above stated, the only primary right for adjudication is the right of the plaintiff to payment of his claim out of the specific property. The other matters are incidental and germane to such primary right. They do not constitute another or other causes of action. *Ibid.*

By whom brought: Who may maintain. See ACTION, 6. MUNICIPAL CORPORATIONS, 4. POOR LAWS, 2, 3.

6. A taxpayer cannot maintain an action to revise, control, or vacate the acts of a municipal government, except as incidental or subsidiary to the protection of some private right or prevention of some private wrong, or to prevent any wrongful squandering or surrender of the moneys, property, or property rights of the municipality, or when unlawful increase in the burdens of taxation is threatened by the proposed action. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493

By and against heirs and next of kin. See ACTION, 4, 5. ESTATES OF DECEDENTS, 4.

Discontinuance: Substitution of plaintiff.

7. The circuit court has jurisdiction to refuse to allow a plaintiff to arbitrarily discontinue his action, and also jurisdiction to allow another plaintiff to be substituted in his place. *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226, followed. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493

At law or in equity? See MORTGAGES, 7. PARTNERSHIP, 3.

8. After the seduction of plaintiff by P. a settlement was made, whereby, for a gross sum paid by P., the claims of plaintiff and her father were released, and the obligation of P. to support the child born to plaintiff was assumed by her father. The money was all paid to the father. *Held*, that an action by the daughter against the father, to determine and recover the part thereof to which she was entitled, is an action at law, but maintainable on equitable principles. *Kammermeyer v. Hilz*, 101

9. In an action at law for the recovery of a share of the profits of a partnership agreed to be paid, the answer suggested, but did not clearly allege, a partnership. The partnership was established by plaintiff's own testimony, and both parties proceeded, without objection, to introduce all evidence necessary to establish the state of accounts between them. Not until the hearing of the motion to confirm the referee's report did defendants clearly object to the adjudication of the amount due in the legal action. All the transactions were so completed as to make nothing necessary but the ascertainment of a money balance due from one partner to another. *Held*, that defendants' conduct was such as to waive any objection to the form of action which they might have made by reason of the fact that the claim grew out of a partnership. *Smith v. Putnam*, 155

For money had and received. See APPEAL, 8, 9. CONTRACTS, 1.

Winding up of corporation. See CORPORATIONS, 13, 14.

Motive in bringing. See INSTRUCTIONS TO JURY, 3, 4. NUISANCE.

ADMINISTRATORS AND EXECUTORS. See ESTATES OF DECEDENTS. EXECUTORS AND ADMINISTRATORS.

ADULTERATION. See LIBEL AND SLANDER, 1–3.

ADVERSE POSSESSION. See EJECTMENT, 2. PARTITION. WATERS, 2, 3.

AGENCY. See BROKERS. INSURANCE, 1. MORTGAGES, 4, 5.

AMENDMENT.
Of charter. See MUNICIPAL CORPORATIONS, 1.
Of pleading. See PLEADING, 1.
Of statutes. See TAXATION, 1, 2, 4, 7.
Of writ. See EJECTMENT, 3.

ANCIENT FENCES. See HIGHWAYS, 8.

APPEAL AND ERROR.

From what appeal may be taken: Orders. See CONTEMPT OF COURT, 2.

Jurisdiction of appeal: Undertaking: Practice. See EJECTMENT, 3.

1. Under the statutory provisions,—sec. 3052, Stats. 1898, requiring the execution of an undertaking for costs by two sureties to render an appeal effectual for any purpose; sec. 3065, providing that such an undertaking shall be of no effect unless accompanied by the affidavits of the sureties justifying as required; and sec. 1966—34, providing that a certified copy of the certificate of the insurance commissioner as to the authority of a surety company to transact business shall be *equivalent* to the justification required of sureties by law,—an undertaking for costs on appeal, executed by a surety company, must have attached such certificate of the commissioner of insurance in order to make the appeal effective. *Johnston v. Northwestern L. S. Ins. Co.* 337

2. In this case, where the insurance commissioner's certificate was not attached to an undertaking for costs on appeal, executed by a surety company, leave was granted, on payment of motion costs, to perfect the undertaking by attaching thereto such certificate. *Ibid.*

Review of intermediate orders.

3. There is no provision of statute which authorizes a review of one intermediate order upon an appeal from another. Sec. 3070, Stats. 1898, provides for review of intermediate orders involving and necessarily affecting the judgment, on appeal from the judgment. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493

Record: Bill of exceptions.

4. On appeal the supreme court is limited to the bill of exceptions for information as to the proceedings on the trial: the opinion rendered by the trial judge, the reporter's minutes, and depositions cannot be considered unless incorporated therein. *Hill v. American Surety Co.* 19

5. Where the record and bill of exceptions do not show that a certain motion was made, other evidence of such fact, even if material, cannot be accepted on appeal. *Smith v. Putnam,* 155

6. Where there is no bill of exceptions returned with the record, errors assigned, based upon rulings made on the trial, cannot be reviewed, although the printed case contains what purports to be a copy of a regularly settled bill of exceptions. *Watson v. Milwaukee,* 328

7. Where no bill of exceptions is returned with the record, the only question open is whether the pleadings and verdict sustain the judgment. *Ibid.*

Record: Exceptions: Questions reviewed. See APPEAL, 4–7. ATTACHMENT, 2.

8. Where there is ample evidence to support a referee's findings of fact, and no clear preponderance against them, the trial court is not justified in setting them aside. *Erickson v. McGeehan Construction Co.* 49

9. Where the record shows that at the close of the testimony a motion was made to direct a verdict, which was denied and an exception duly taken, the testimony will be reviewed on appeal in order to determine whether the motion should have been granted, although no motion for a new trial was made. *McGinn v. French,* 54

10. A general exception to a finding covering a large number of matters correctly found with a few not so found, is not sufficient to require the supreme court to review an assignment of error to the erroneous items. *Jordan v. Estate of Warner,* 539

11. An order vacating an attachment of property is not reviewable on appeal from the judgment in the action. It must be reviewed on appeal from the order setting aside the attachment. *Adkins v. Loucks,* 587

Affirmance and reversal: Material and immaterial errors. See APPEAL, 7. COSTS, 7. DAMAGES, 1, 5. EJECTMENT, 2–4. EVIDENCE, 1, 4. FRAUDULENT CONVEYANCES, 7, 8. GARNISHMENT, 1. INSTRUCTIONS TO JURY, 5. INTEREST, 2, 3. MASTER AND SERVANT, 8, 9, 11, 12. MUNICIPAL CORPORATIONS, 10, 11. SETTLEMENT, 2. VENDOR AND PURCHASER, 3, 5. VOLUNTARY ASSIGNMENT, 4.

12. A finding that a transaction in issue was within a partnership agreement, and not a separate and independent transaction of the defendants in which plaintiff was not a participant, will not be disturbed on appeal, where the evidence of the parties is squarely in conflict, and there are items of circumstantial evidence confirmatory of either theory. *Smith v. Putnam,* 155

13. Where the evidence was all on one side and uncontradicted, and so conclusively established all of the facts material to plaintiff's recovery that it would have been the duty of the court to direct a verdict in her favor, the refusal of the court to allow a jury trial is not prejudicial to defendant, and the error, if any, cannot be ground for reversal on appeal, under the positive command of sec. 2829, Stats. 1898, that no judgment shall be reversed for any error or defect which shall not affect the substantial rights of the adverse party. *Brauchle v. Nothhelfer,* 457

14. In an action tried by the court, where the evidence to which the rulings of the court were directed did not vary or materially add to the evidence received without objection, the error in such rulings, if any, is immaterial, because right or wrong they do not affect the final result. *Jordan v. Estate of Warner,* 539

15. Clerical errors in an account as settled by the court, made in preparing findings from minutes which the referee had before him, easily reconciled with the record without changing the final result, are not prejudicial to the appellant. *Ibid.*

Previous determination of the same matter. See EJECTMENT, 1. FRAUD, 2. GUARANTY, 2. WILLS, 5.

16. Where on the retrial of an action, after appeal to the supreme court, the evidence is no more extensive upon the questions at issue than upon the former trial, the propositions of law laid down on the

former appeal are *res adjudicata*, and must control, whatever the appellate court may think, on the second appeal, as to their soundness. *Johnston v. Northwestern L. S. Ins. Co.* 337

17. Where negotiations between the principal in a letter of guaranty and the guarantee, in regard to reducing the guarantor's liability from $2,000 to $1,000, were abandoned before notification of acceptance was given the guarantor, who was not a party to the negotiations and had no knowledge of the communications in respect thereto; and where on that state of the record, in a suit on such letter of guaranty, it was decided on appeal that what occurred in regard to a change of the guaranty was immaterial, such decision is *held* to rule adversely to the guarantor an assignment of error to the refusal of the trial court, on the second trial, to receive in evidence letters that passed between the guarantee and the principal in regard to such change. *New Home Sewing Machine Co. v. Simon,* 368

18. Where on a second appeal the record shows that the evidence on a given point is precisely the same as on the first trial, failure on the first appeal to rely upon error in respect thereto is a waiver of the right to do so on the subsequent appeal. *Richter v. Estate of Leiby,* 404

Mandate directing judgment, when proper.

19. Upon reversal of a judgment in an action at law in which a jury trial has been waived, the supreme court is not limited to awarding a new trial as in cases tried by a jury, but, as in equity cases, may exercise the utmost freedom in directing the course to be pursued by the trial court. *Hill v. American Surety Co.* 19

20. In an action for personal injuries the jury by a special verdict awarded plaintiff $4,000 for displacement of the semilunar cartilage, $200 for impairment of hearing, and fixed her damages generally at $5,000. On appeal the evidence was held insufficient to sustain a recovery for the displacement of said cartilage. *Held,* that a new trial would not be granted, but the judgment would be affirmed except as to the damages awarded for such displacement. *Smith v. C. & N. W. R. Co.* 35

Appeal from county court. See WILLS, 2.

Appeal from justice of the peace.

21. Where a plaintiff has appealed from a final judgment rendered in justice's court, dismissing the action for noncompliance with an order requiring security for costs, and made the affidavit entitling him to a new trial, the filing of the record in the circuit court gives pendency to the action in that court, where it is entitled to a trial on the merits, and the propriety or impropriety of the justice's action in ordering security for costs, or dismissing the action for noncompliance with such order, is not the subject of review. *Dorothy v. Richmond,* 652

Appeal from taxation of costs. See COSTS, 5, 6.

Appeal from order laying out highway. See HIGHWAYS, 3.

APPEALABLE ORDERS. See CONTEMPT OF COURT, 2.

APPEARANCE. See LANDLORD AND TENANT, 6.

APPLICATION OF PAYMENTS. See BUILDING AND LOAN ASSOCIATIONS, 1, 6.

APPURTENANCES. See HIGHWAYS, 6. LANDLORD AND TENANT, 1, 2.

ARCHITECTS. See CONTRACTS, 2. LIENS, 2, 3.

ASSAULT. See TRESPASS, 1.

ASSESSMENT of taxes. See TAXATION, 1–6.

ASSIGNMENT.
For benefit of creditors. See VOLUNTARY ASSIGNMENT.
Of judgments. See JUDGMENTS, 5, 6.
Of stock. See PLEDGES, 1.

ASSUMPTION.
Of debt. See MORTGAGES, 1, 2.
Of risk. See LANDLORD AND TENANT, 5. MASTER AND SERVANT, 1, 6, 7, 10–12, 14.

ATTACHMENT.

See APPEAL, 11. ESTATES OF DECEDENTS, 4.

1. The plaintiff in attachment proceedings is not liable for the acts of an officer in levying upon property of a stranger to the writ, where it is not shown that he instigated such levy or ratified it with knowledge. *Adams v. Savery House Hotel Co.* 109

2. In order to warrant an inference of approval of such a levy by the attaching creditor from acts of attorneys in assisting in the execution of a bond for the release of the goods levied upon, the evidence must show that the attorneys were attorneys for such creditor in the attachment proceedings; and assertions to that effect, made on appeal by attorneys for the plaintiff in an action for the conversion, cannot be accepted as a substitute therefor. *Ibid.*

3. The provisional remedy for the attachment of property under the statutes of this state is confined to actions at law to recover money due from the defendant upon contract. *Adkins v. Loucks,* 587

ATTORNEYS AT LAW. See EVIDENCE, 3. JUDGMENTS, 5. WILLS, 1.

BANKRUPTCY. See VOLUNTARY ASSIGNMENT, 8, 9.

BENEFIT SOCIETIES. See INSURANCE, 3.

BETTERMENTS. See EJECTMENT, 2.

BILL OF EXCEPTIONS. See APPEAL, 4–7.

BILL OF SALE. See FRAUDULENT CONVEYANCES, 2, 4–6.

BILLS AND NOTES.

See GUARANTY, 3, 4. MARRIED WOMEN. MORTGAGES, 5, 6. VOLUNTARY ASSIGNMENT, 10.

1. A lessor gave his lessee a promissory note for $100, payable "on or before four years after date," and reciting that it was executed as security for the payment of $100 to be paid by the conditions of a five years' lease contemporaneously executed, and was to become due provided the lessor sold the demised premises, otherwise to be void and of no value. *Held,* that construing the note and lease together the manifest purpose was merely to compensate the lessee for loss of the possession of the premises and the benefits of the lease. The lessee was therefore not entitled to judgment on the note while he retained such possession and benefits. *Pagel v. Nickel,* 471

2. A note payable "on or before" a certain date, while it gives the maker the privilege of paying at any time before that date, does not give the holder the right to enforce collection before that time. *Ibid.*

BOARD.
County. See COUNTIES.
Town. See MANDAMUS, 1-3.
Of dental examiners. See MANDAMUS, 4.
Of review. See TAXATION, 5.
BONDS. See SURETYSHIP. VOLUNTARY ASSIGNMENT, 2-5.

BROKERS.

1. The fact that plaintiffs, who had been employed by defendant as agents to sell his farm under an agreement that they should have as commissions whatever a purchaser would pay over $10,000, offered the farm for a greater sum to N., who promised to examine it and make an offer, and to deal only with plaintiffs, but purchased it from defendant for $10,000 after plaintiffs had notified defendant of the name of the expected purchaser and the amount asked, does not show performance of an express contract of employment, since performance of such contract consists in providing a purchaser ready, able, and willing to pay the price fixed. *Ames v. Lamont*, 531

2. There being no evidence in such case that defendant, after such notification, did any act, inconsistent with the utmost good faith towards plaintiffs, to deter N. from purchasing at the price named by the agents, or suggested the possibility of acceptance of a less price, and the only evidence offered as to the transaction between defendant and N. being that ultimately sale was made for $10,000, no right to recover damages founded on defendant's breach of the contract was established. *Ibid.*

3. The fact that plaintiffs' services were rendered on the faith of the express promise to pay therefor only the excess obtained over $10,000 excludes any inference or implication of a different understanding by them or promise by defendant; and they cannot recover upon an implied contract to pay the reasonable value of their services in finding a purchaser. *Ibid.*

4. Evidence that plaintiffs reported to defendant that they had offered the farm to N. at $45 an acre (a larger price than $10,000 for the whole); that he thereupon replied "All right, I will ask him [N.] $45 an acre for the farm;" that the principal thereafter sold the farm to N. for $10,000; and that such reply was made after all the services for which plaintiffs sued had been rendered, is *held* insufficient to show any consideration for defendant's promise that he would ask N. $45 per acre for the farm. *Ibid.*

BUILDING AND LOAN ASSOCIATIONS.

1. A building and loan association, on making a loan to C., took a mortgage on real estate, and also an assignment of C.'s shares of stock, for security. C. executed a second mortgage on said real estate to the defendant M., and thereafter the association, in ignorance of M.'s mortgage, made a second loan to C. and took an assignment of the equity in C.'s stock as security. *Held*, that M. had no absolute right to have the value of C.'s stock applied in payment of the plaintiff's mortgage. *Provident Loan & Building Asso. v. Carter*, 383

2. In such case C. cannot question the authority of the association to make the loan; as a member of the association he was bound to

take notice of the limitations upon its power, and, having assented to the transaction, he is estopped from contesting it. *Ibid.*

3. In such case the making of the second loan was not *ultra vires*, it being within the general powers of the association. *Ibid.*

4. In such case, *held*, that M., a second mortgagee, could not question the authority of the association to make the second loan: M.'s rights must be tested by his status as a subsequent incumbrancer of mortgaged property, unless he gave the association notice of the existence of his mortgage before the second loan was made. *Ibid.*

5. In such case the record of the second mortgage was not notice thereof to the association. The recording act applies only to subsequent purchasers or incumbrancers. *Ibid.*

6. Where plaintiff has security on two funds and defendant upon one of them, and, without notice that defendant has any interest in either, the plaintiff in good faith disposes of the fund upon which defendant has no claim, the laches of the defendant precludes him from insisting that plaintiff shall first exhaust his remedy against the fund upon which defendant has no security. *Ibid.*

7. Where the by-laws of a building and loan association provided that, in case of nonpayment of instalments of interest or premium by borrowing stockholders *for the space of six months*, proceedings might be taken on the bond or mortgage to collect the same according to law, and it was admitted that all payments on defendant's bond and mortgage, which required payments to be made on or before the second Monday of each month, had been made to and including that which became due the second Monday of March, the first default occurred on the second Monday of April, and an action commenced September 21 following was premature. *Ibid.*

BURDEN OF PROOF. See FRAUDULENT CONVEYANCES, 5. VOLUNTARY ASSIGNMENT, 3.

CANCELLATION OF POLICY. See INSURANCE, 1, 2.

CARRIERS. See RAILROADS, 1, 2.

CASES DISTINGUISHED, ETC.

1. *Adams v. Beloit*, 105 Wis. 363 (as to adoption of parts of general city charter), distinguished. *State ex rel. Boycott v. Mayor, etc., of La Crosse*, 658, 659

2. *Ahlhauser v. Doud*, 74 Wis. 400 (as to lien of judgment), explained. *French L. Co. v. Theriault*, 636

3. *Annas v. M. & N. R. Co.* 67 Wis. 63. See No. 35.

4. *Avery v. Johann*, 27 Wis. 246 (as to application of purchase money), limited. *Missinskie v. McMurdo*, 586

5. *Bartel v. Brown*, 104 Wis. 493 (as to evidence of agent's authority), followed. *Kohl v. Beach*, 414; *Spence v. Pieper*, 456

6. *Binder v. McDonald*, 106 Wis. 332 (as to insolvent law), followed. *Segnitz v. Garden City B. & T. Co.* 175

7. *Bingham v. Ins. Co.* 74 Wis. 498. See No. 51.

8. *Chopin v. Badger P. Co.* 83 Wis. 102 (as to assumption of risk by minor), distinguished. *Helmke v. Thilmany*, 223

9. *Cole, Estate of: Mulberger v. Beurhaus*, 102 Wis. 1 (as to right of taxpayer to sue), distinguished. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 504

10. *Collins v. Lowry*, 78 Wis. 329 (as to damages in conversion), disapproved. *Cernahan v. Chrisler*, 648, 650

11. *Cook v. Milwaukee*, 25 Wis. 270; *S. C.* 27 Wis. 191 (as to liability of city for accident caused by accumulations of snow or ice), distinguished. *Dapper v. Milwaukee*, 91

12. *Cornell v. Radway*, 22 Wis. 260 (as to lien of judgment), explained. *French L. Co. v. Theriault*, 633–635

13. *Courtney v. McGavock*, 23 Wis. 619 (as to attorney's lien), distinguished. *Stanley v. Bouck*, 231, 232

14. *Driver v. W. U. R. Co.* 32 Wis. 569 (as to discontinuing condemnation proceedings), distinguished. *Babcock v. C. & N. W. R. Co.* 283

15. *Dyer v. Gibson*, 16 Wis. 557 (as to statute of frauds), distinguished. *Commercial Nat. Bank v. Smith*, 577

16. *Eastman v. Schettler*, 13 Wis. 325 (as to lien of judgment), explained. *French L. Co. v. Theriault*, 632

17. *Evans v. Laughton*, 69 Wis. 138 (as to lien of attachment), explained. *French L. Co. v. Theriault*, 636

18. *Fuller's Will*, 75 Wis. 431. See No. 23.

19. *Galloway v. Hamilton*, 68 Wis. 651 (as to lien of judgment), explained. *French L. Co. v. Theriault*, 635

20. *Gates v. Boomer*, 17 Wis. 455 (as to lien of judgment), explained. *French L. Co. v. Theriault*, 633, 634

21. *Gilbert v. Stockman*, 81 Wis. 602 (as to lien of judgment), explained and followed. *French L. Co. v. Theriault*, 631–633, 637, 644

22. *Geiser T. M. Co. v. Smith*, 36 Wis. 295 (as to costs), distinguished. *Cernahan v. Chrisler*, 651

23. *Harrington v. Pier*, 105 Wis. 485 (as to bequests for charity), followed; *Will of Fuller*, 75 Wis. 431, distinguished and disapproved. *Hood v. Dorer*, 149, 152

24. *Hobart v. Milwaukee City R. Co.* 27 Wis. 194 (street railways not additional burden to fee), followed. *La Crosse City R. Co. v. Higbee*, 389, 392–394, 397, 398, 403

25. *Holton v. Burton*, 78 Wis. 321; *Second Ward S. Bank v. Schranck*, 97 Wis. 250 (as to insolvent law), criticised. *Segnitz v. Garden City B. & T. Co.* 174

26. *Hyde v. Chapman*, 33 Wis. 391 (as to lien of judgment), explained and followed. *French L. Co. v. Theriault*, 631, 632

27. *Illinois Steel Co. v. Budzisz*, 106 Wis. 499 (as to amendment permitting pleading statute of limitations), distinguished. *Sullivan v. Collins*, 293

28. *Johnston v. N. W. L. S. Ins. Co.* 94 Wis. 117 (as to statements to agent being representations), limited. *Johnston v. N. W. L. S. Ins. Co.* 338, 346

29. *Kohl v. Beach*, 107 Wis. 409 (as to evidence of agent's authority), followed. *Spence v. Pieper*, 456

30. *Krueger v. Wis. Tel. Co.* 106 Wis. 96 (as to use of streets for telephone poles), distinguished in *La Crosse City R. Co. v. Higbee*, 389, 391, 393; approved in *Linden Land Co. v. Milwaukee E. R. & L. Co.* 512

31. *La Crosse City R. Co. v. Higbee*, 107 Wis. 389 (street railway poles not additional burden to fee), followed. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 494, 511

32. *Laycock v. Parker*, 103 Wis. 161 (as to interest), distinguished. *J. I. Case P. Works v. Niles & Scott Co.* 17

33. *McArthur v. Slauson*, 53 Wis. 41 (as to commissions of real-estate agents), followed. *Ames v. Lamont* 533

34. *McKeague v. Green Bay*, 106 Wis. 577. See No. 40.

35. *Middleton v. Jerdee*, 73 Wis. 44; *Annas v. M. & N. R. Co.* 67 Wis. 63 (as to correcting erroneous instructions), distinguished. *New Home S. M. Co. v. Simon*, 377

36. *Mitchell v. Plover*, 53 Wis. 548 (as to classification of personal property by assessor), distinguished. *State ex rel. Davis & Starr L. Co. v. Pors*, 430

37. *Morris v. W. M. R. Co.* 82 Wis. 541 (as to construction of railway track on another's land), distinguished. *Babcock v. C. & N. W. R. Co.* 283

38. *Mulberger v. Beurhaus*, 102 Wis. 1. See No. 9.

39. *North Hudson M. B. & L. Asso. v. Childs*, 82 Wis. 460 (as to liability of officers of corporations for misfeasance, etc., of officers), distinguished. *Michelson v. Pierce*, 87

40. *Parish v. Eden*, 62 Wis. 272 (as to notice of claim for death), followed; *McKeague v. Green Bay*, 106 Wis. 577, distinguished. *Carpenter v. Rolling*, 560, 565

41. *Parry v. Spikes*, 49 Wis. 384. See No. 49.

42. *Sage v. Fifield*, 68 Wis. 546 (as to limitation on taxation), distinguished. *Mueller v. Cavour*, 603

43. *Schumaker v. Heinemann*, 99 Wis. 251. See No. 50.

44. *Second Ward S. Bank v. Schranck*, 97 Wis. 250. See No. 25.

45. *Simonsen v. Herold Co.* 61 Wis. 626 (as to pleading malice in libel), distinguished. *Dabold v. Chronicle Publishing Co.* 362

46. *State ex rel. Giblin v. Sup'rs of Union*, 68 Wis. 158 (as to proceedings to lay out highway to lands excluded from access), followed. *Baier v. Hosmer*, 380, 381

47. *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226 (as to discontinuance, etc., of action), followed. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493, 502

48. *Sterling v. Ryan*, 72 Wis. 36 (as to reservation of board bills of employees by contractors), distinguished. *Erickson v. McGeehan Construction Co.* 50, 54

49. *Taylor v. Pratt*, 3 Wis. 674; *Parry v. Spikes*, 49 Wis. 384 (as to consideration for guaranty), followed. *Commercial Nat. Bank v. Smith*, 574, 576, 577

50. *Treat v. Hiles*, 81 Wis. 280; *Schumaker v. Heinemann*, 99 Wis. 251 (as to damages for breach of contract), distinguished. *McCall Co. v. Icks*, 240

51. *Walters v. St. Joseph F. & M. Ins. Co.* 39 Wis. 489; *Bingham v. Ins. Co.* 74 Wis. 498 (as to cancellation of insurance policy), distinguished. *Wicks Bros. v. Scottish Union & Nat. Ins. Co.* 610

52. *Weadock v. Kennedy*, 80 Wis. 449 (as to cross-examination of party), language criticised. *Sullivan v. Collins*, 291, 295

CERTIFICATE. See APPEAL, 1.

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

CHARITY. See WILLS, 3–5.

CIRCUIT COURTS. See ACTIONS, 7. CORPORATIONS, 8. COURTS.

CITIES. See INSTRUCTIONS TO JURY, 2, 6, 7. MUNICIPAL CORPORATIONS. POOR LAWS.

COMMERCIAL PAPER. See BILLS AND NOTES. GUARANTY, 3, 4. MARRIED WOMEN. MORTGAGES, 5, 6. VOLUNTARY ASSIGNMENT, 10.

COMMISSIONS. See BROKERS.

COMMON CARRIERS. See RAILROADS, 1, 2.

COMMON COUNCIL. See CORPORATIONS, 3. MUNICIPAL CORPORATIONS, 1–4.

CONDEMNATION OF LAND. See RAILROADS, 2–5.

CONDITIONAL DELIVERY. See GUARANTY, 1, 2.

CONSIDERATION. See BROKERS. CONTRACTS, 3. FRAUDULENT CONVEYANCES, 2. GUARANTY, 3, 4.

CONSTITUTIONAL LAW.

See CORPORATIONS, 8.

1. Sec. 1862, Stats. 1898, authorizing the formation of street railway corporations, and the granting to them, by municipal corporations, of the use of streets for the carriage of *freight* and passengers, is not unconstitutional, in that it makes such railway a commercial railway and nowhere provides for the payment of compensation to the abutting owner: the statute is intended to authorize corporations to use streets, with the consent of the city. for carriage of freight *as against the rights* of the public only, not as against private owners, who are left in full possession of their rights to stop the construction, insist on compensation, or give their consent, as they chose. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493

2. While franchises permitting street railway corporations to use and occupy city streets are legislative grants, in that in granting them the common council is exercising legislative power delegated to it by the state, they are not grants of "corporate powers or privileges" within sec. 31, art. IV, Const., prohibiting the enacting of any special or private law granting corporate powers or privileges. They are not franchises essential to corporate existence, and granted as part of the organic act of incorporation, but are such as may be sold and assigned, if assignable, or lost by forfeiture, and yet not thereby affect the corporate existence of the street railway. *Ibid.*

CONSTRUCTIVE NOTICE. See INSTRUCTIONS TO JURY, 2.

CONSTRUCTIVE TRUST. See FRAUD, 1.

CONTEMPORANEOUS AGREEMENT. See BILLS AND NOTES, 1.

CONTEMPT OF COURT.

1. Under sec. 3489, Stats. 1898, applicable to contempt proceedings to enforce the civil remedy of the plaintiff and protect his rights in the action, the court found the defendants "guilty of a technical violation" of an injunctional order, but failed to find, as required by said statute, that "the misconduct was calculated to, or actually did, defeat, impede or prejudice the rights and remedies" of the plaintiff. *Held* that, in the absence of the findings required

by statute, an order requiring defendant to pay a fine and the costs of the proceedings was without authority. *McEvoy v. Gallagher*, 331

2. Such order, being one that affects the substantial rights of the defendants, and being made in a special proceeding, is appealable. *Ibid.*

CONTRACTS.

See ACTION, 1, 2. BILLS AND NOTES. BROKERS. DAMAGES, 2, 4, 5. GUARANTY. INSTRUCTIONS TO JURY, 3. INSURANCE. INTEREST, 1, 4. LANDLORD AND TENANT, 1–4, 9. LIENS. MORTGAGES. PARTNERSHIP. PARTITION. SALE OF CHATTELS.

1. Defendant sublet the construction of certain roadbed to D. under a contract authorizing it to pay D.'s employees and deduct such payments from the amount payable to him. D. employed plaintiff to run a boarding camp and store. Defendant paid D.'s employees on monthly pay rolls furnished by him, deducting the amount of advances charged to each man including board, etc., furnished by plaintiff, but there was no contract made by defendant with plaintiff, or with D. for his benefit, that it would reserve the amount due plaintiff from D.'s employees and pay the same to plaintiff. When said pay rolls were presented D. owed, and still owes, defendant an amount in excess of all such deductions. *Held*, that plaintiff could not recover as for money had and received the amounts deducted by defendant by reason of the board, etc., furnished by plaintiff. *Sterling v. Ryan*, 72 Wis. 36, distinguished. *Erickson v. McGeehan Construction Co.* 49

2. Plaintiff, an architect, agreed in writing with defendant to make plans and specifications for a building and superintend its construction for a stipulated price. After accepting the plans and specifications made, defendant abandoned the idea of erecting the building in accordance therewith, and ordered plaintiff to make new plans for an entirely different structure, which was done. *Held*, that the accepted order for the second set of plans constituted a new contract having no relation to the work done under the written contract, and did not preclude recovery of compensation for the second set in addition to the price agreed upon in the written contract. *Fitzgerald v. Walsh*, 92

3. An offer to purchase goods expressly stated that on its acceptance it should constitute a contract binding between the parties for a certain term. It was signed by the purchaser and such signature was followed by a stipulation to save the purchaser harmless, on certain conditions, from loss through handling the goods. It also contained an acknowledgment of a payment on the contract, and the seller signed by its duly authorized agent. *Held*, that the transaction between the parties constituted a binding contract, and was not void for want of mutuality or consideration. *McCall Co. v. Icks*, 232

4. A contract, whereby defendants agreed to take monthly as produced and placed on the market by plaintiff, for the period of two years, one of each size of certain fashion patterns, and the plaintiff therein agreed to furnish such goods, is not void for uncertainty. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 15. LANDLORD AND TENANT, 5. MASTER AND SERVANT, 7, 10. MUNICIPAL CORPORATIONS, 11, 12. RAILROADS, 6.

CONVERSION. See INTEREST, 1. TROVER AND CONVERSION.

CONVEYANCES. See DEEDS. FRAUD. FRAUDULENT CONVEYANCES. MORTGAGES. VENDOR AND PURCHASER.

CORPORATIONS.

See BUILDING AND LOAN ASSOCIATIONS. MUNICIPAL CORPORATIONS. PLEADING, 3, 4. RAILROADS. VILLAGES. VOLUNTARY ASSIGNMENT, 11.

Organization: Defective incorporation. See RAILROADS, 1.

Stock and stockholders. See BUILDING AND LOAN ASSOCIATIONS, 1-5. CORPORATIONS, 13. PLEDGES.

Franchises: Forfeiture.

1. A special privilege granted by sovereign authority, either to an individual or a corporation, is a franchise. *State ex rel. Att'y Gen. v. Portage City Water Co.* 441
2. It is not essential to a franchise that the grant be made direct; it is sufficient if it be made through a legitimate legislative agency. *Ibid.*
3. A grant made by the common council of a city, by authority of its charter, to construct, maintain, and operate a system of waterworks in such city and to use the streets and alleys thereof for that purpose, is a legislative grant through the medium of an authorized legislative agency, and is a franchise. *Ibid.*
4. A franchise granted to an organized corporation, or to an individual or individuals, and thereafter transferred to a corporation, is not a corporate franchise strictly so called, or in any sense, except that of being property of the corporation. *Ibid.*
5. Sec. 3241, Stats. 1898, covers only the subject of the forfeiture of charters of domestic corporations for the reasons therein mentioned. *Ibid.*
6. The enactment of sec. 3466, Stats. 1898, into statute law was not an adoption of 9 Anne, ch. 20, sec. 4, with the English construction thereof, but of sec. 28, tit. 2, ch. 9, pt. III, 2 R. S. N. Y. 1829, and the construction thereof by the New York courts. *Ibid.*
7. Unlike the statute of Anne, sec. 3466 contains no word or words of limitation as regards the meaning of the word "franchise," but it is used in its general sense, so as to include franchises regardless of whether they are corporate or not. *Ibid.*
8. The constitutional jurisdiction of the circuit courts of this state, subject to exceptions mentioned in the constitution, extends to all civil matters, including those covered by sec. 3466, and such jurisdiction under such section may be exercised under sec. 3463, the statutory substitute for *quo warranto* proceedings and the remedy by writ of *scire facias* at the common law. *Ibid.*
9. The word "person" in a legislative enactment includes a corporation if that appears to have been the legislative intent, and that is governed by the rule of statutory construction in sec. 4971, Stats. 1898, and elementary principles as well. Such word in sec. 3466 is so governed. *Ibid.*
10. Proceedings by *quo warranto* at the common law were proper to reclaim a franchise, whether corporate or not, for abuse of it or nonperformance of a condition of the grant, and jurisdiction in that regard is complete regardless of sec. 3466, the remedy being under sec. 3463, the statutory substitute for the common-law remedy. *Ibid.*

11. A proceeding to forfeit a franchise owned by a corporation, which franchise is not dependent upon corporate existence, may be maintained against the corporation entirely independent of whether it be a domestic or foreign body. *Ibid.*

12. If the owner of a franchise fail to perform the conditions of the grant, the franchise is thereby ended, and an action may be brought by the attorney general in the name of the state to obtain a judicial declaration of the forfeiture, either under sec. 3466, Stats. 1898, or by the rules of the common law. *Ibid.*

Insolvency: Winding up.

13. An action to wind up and settle the affairs of an insolvent corporation may be maintained by a stockholder, when it appears from the complaint that the relation of debtor and creditor exists between the corporation and the plaintiff, and it does not appear that the action results from the mere fact that plaintiff is a stockholder. *Michelson v. Pierce,* 85

14. In an action by a creditor to wind up and settle the affairs of an insolvent corporation and enforce liability of officers for malfeasance and nonfeasance, the fact that it appears on the face of the complaint that a receiver of the corporation has been appointed in the same action, does not render the complaint demurrable. *Ibid.*

15. An officer of a corporation is not relieved from liability to creditors of the corporation for acts of misfeasance and nonfeasance by reason of his services having been performed gratuitously. *Ibid.*

Municipal corporations. See MUNICIPAL CORPORATIONS.

CORPORATE SURETYSHIP. See APPEAL, 1.

COSTS.

See DIVORCE. TROVER AND CONVERSION. WILLS, 2.

1. Where the plaintiff, after service of garnishee process, discontinues the principal action and judgment of discontinuance is thereupon entered, the defendant has judgment within the meaning of sec. 2766, Stats. 1898, and he is thereupon entitled to tax his costs in accordance with sec. 2921, Stats. 1898, regulating the items of the fee bill. *Cotzhausen v. H. W. Johns Mfg. Co.* 59

2. In such case sec. 2772, Stats. 1898, does not apply, the case of dismissal of garnishment proceedings upon judgment for defendant in the principal action being expressly provided for by sec. 2766, Stats. 1898. *Ibid.*

3. Sec. 2762, Stats. 1898, does not limit the amount of costs which, under sec. 2766, Stats. 1898, the defendant can recover in the garnishee action upon the discontinuance of the principal action. *Ibid.*

4. Sec. 2762, Stats. 1898, fixing the garnishee's costs at three dollars, where his answer shows a present indebtedness to defendant, does not apply where the garnishee's answer shows an indebtedness to some corporation of the same name, the identity of which with the defendant is not conceded. *Ibid.*

5. On appeal from the taxation of costs in favor of the defendant and against the plaintiff, the fact that the rights of the garnishee against the plaintiff are ignored does not prejudice the plaintiff. *Ibid.*

6. Where on taxation of costs by the clerk none but general objections are overruled, specific items of the bill cannot be reviewed on an appeal from the clerk's taxation. *Ibid.*

7. An order sustaining a demurrer, which required the defeated party to pay $10 costs absolutely, is *held* erroneous. Such costs can only be required as a condition for pleading over. *State ex rel. Rice v. Chittenden,* 354

COUNTERCLAIM. See PLEADING, 2.

COUNTIES.

See POOR LAWS.

Sec. 2, ch. 267, Laws of 1895, provides that in any case in which a county contributes to the support of a child committed to an orphan asylum "said county may, by a majority vote of its board of supervisors, remove said child from said institution." Sec. 665, Stats. 1898, provides that "a majority of the supervisors entitled to a seat in the county board shall constitute a quorum for the transaction of business," and that "all questions shall be determined by a majority of the supervisors present unless otherwise provided." *Held,* that for the purpose of a legal removal of a child so committed, a quorum of the members of the board is the board, and a majority vote of such quorum is a majority vote of the board. *St. Æmilianus Orphan Asylum v. Milwaukee Co.* 80

COUNTY BOARD. See POOR LAWS.

COUNTY JUDGE. See ESTATES OF DECEDENTS, 1-3.

COURT AND JURY. See APPEAL, 13. DAMAGES, 7. FRAUDULENT CONVEYANCES, 2. HIGHWAYS, 10, 11. INSURANCE, 6, 7. MUNICIPAL CORPORATIONS, 8, 12. VENDOR AND PURCHASER, 8.

COURTS.

See ACTION, 7. APPEAL, 8. EVIDENCE, 3.

Ch. 112, Laws of 1893, creating the municipal court of Douglas county, conferred on such court exclusive jurisdiction in misdemeanors, and suspended the jurisdiction of the circuit and superior courts of that county in such minor offenses. Ch. 33, Laws of 1893, gave the superior court jurisdiction concurrent with the circuit court in prosecutions for misdemeanors. By ch. 278, Laws of 1895, such exclusive character of the jurisdiction of the municipal court was taken away. *Held* that, since ch. 112, Laws of 1893, did not repeal ch. 33, Laws of 1893, but merely suspended it, it was not a repealing act within the meaning of sec. 4973, Stats. 1898, and therefore the removal of the suspension by ch. 278, Laws of 1895, left ch. 33, Laws of 1893, in full force and restored the jurisdiction of the superior court. *State v. Sawell,* 300

COVENANTS. See MORTGAGES, 1, 2.

COVERTURE. See MARRIED WOMEN.

CREDITOR'S REMEDIES. See ATTACHMENT. DEBTOR AND CREDITOR. FRAUDULENT CONVEYANCES. GARNISHMENT. LIENS. VOLUNTARY ASSIGNMENT.

CRIMINAL LAW AND PRACTICE. See COURTS.

CROSS-EXAMINATION. See EVIDENCE. LIENS, 5. VENDOR AND PURCHASER, 3.

DAMAGES.

See ACTION, 2. APPEAL, 20. BROKERS, 2. INTEREST, 1, 4. LANDLORD AND TENANT, 5. MORTGAGES, 11. SALE OF CHATTELS, 1. SETTLEMENT, 1. TRESPASS. TROVER AND CONVERSION, 2. VENDOR AND PURCHASER, 9.

1. In an action against the city for a broken leg caused by a defective street, happening in November 1891, it is error to admit the evidence of plaintiff's physician that he performed an operation on plaintiff's leg in the summer of 1893 for which he charged $100, there being no testimony showing any necessary or causal connection between the injury and the subsequent operation. *Rhyner v. Menasha,* 201

2. Where damages are claimed for breach of contract to purchase fashion patterns as produced and placed on the market, and the full contract period has run, and hence the exact number of patterns called for susceptible of proof, recovery cannot be had based on evidence, taken long before the expiration of the contract period, as to the probable number of patterns that plaintiff would produce each month for the balance of such period: the proofs should be confined to patterns shown to have been actually produced. *McCall Co. v. Icks,* 232

3. Plaintiff, a boy sixteen years of age, was injured so that amputation of one arm was necessary, and the other dislocated at the wrist and elbow and so broken and injured that its use was permanently impaired. He suffered much pain, though able to be about in four or five weeks after the injury. He received an injury to the head and had difficulty in passing urine, which might be due to some local cause or an injury to the spine or brain. Prior to the injury he was healthy and was receiving $1 per day. *Held,* that a verdict for $20,000 damages was largely in excess of what was warranted by the law and the evidence, and that a new trial should be granted unless plaintiff remitted all damages in excess of $12,000. *Renne v. United States Leather Co.* 305

4. Where the amount due plaintiff, if he is entitled to a verdict, is susceptible of being determined with mathematical accuracy, a verdict for plaintiff for a less amount shows that the cause was not fairly considered by the jury, and that the verdict was purposely and recklessly made regardless of the evidence. *New Home Sewing Machine Co. v. Simon,* 368

5. In such case, where it is clear that such prejudicial misconduct has taken place, there is no room for the exercise of judicial discretion in disposing of a motion to vacate the verdict and grant a new trial. *Ibid.*

6. Where an injury to a child thirteen years of age was a simple fracture of the fibula, which reunited in the ordinary course and under ordinary surgical treatment, and, in the opinion of a majority of the medical experts, there had been a complete recovery; and it appeared that the plaintiff walked with no limp ordinarily perceptible, and only complained of some pain in rainy weather, a verdict of $2,500, reduced by the trial court to $1,700, is excessive, even as reduced. *Collins v. Janesville,* 436

7. On an issue as to the pecuniary loss of a widow, caused by the death of her husband, the evidence was *held* sufficient to authorize the submission of the question to the jury. *Carpenter v. Town of Rolling,* 559

DEBTOR AND CREDITOR.

See ACTION, 4, 5. ATTACHMENT. CORPORATIONS, 13–15. FRAUDULENT CONVEYANCES. INSTRUCTIONS TO JURY, 3, 4. PARTIES, 2. PLEDGE, 1. VOLUNTARY ASSIGNMENT.

A husband failed in the logging business, and, in good faith, a third party advanced the wife, who had shown herself thrifty and energetic and able to conduct a small store and hotel, money to continue the business, on condition that she secure the skill and services of her husband, which she did, paying him a salary. *Held*, that such business belonged to the wife, and hence the profits accumulated therefrom, though in a large measure due to the husband's skill and services, are also hers, and are not subject to be taken for the husband's debts. *Kendall v. Beaudry*, 180

DEDICATION. See HIGHWAYS, 5–7.

DEEDS.

See FRAUDULENT CONVEYANCES, 10. MORTGAGES, 1, 2. VENDOR AND PURCHASER, 6.

A deed made by an insane person not under guardianship is voidable only. It passes title so that a judgment thereafter rendered and docketed will not be a specific lien on the property conveyed till the conveyance be actually avoided; and if before that occur the insane person die, the judgment creditor cannot, by execution levy under sec. 2978, Stats. 1898, obtain a lien on such property which equity will aid by removing the cloud created thereon by such conveyance. *French Lumbering Co. v. Theriault*, 627

DEFEASANCE. See MORTGAGES, 7–10.

DEFINITIONS. See WORDS AND PHRASES.

DELEGATION OF AUTHORITY. See MORTGAGES, 4.

DEMURRER. See CORPORATIONS, 14. COSTS, 7. LIBEL AND SLANDER, 3, 4. MANDAMUS, 4. PLEADINGS, 2, 3. VOLUNTARY ASSIGNMENT, 6. WATERS, 2.

DENTISTS. See MANDAMUS, 4.

DEVASTAVIT. See SURETYSHIP.

DEVISES. See WILLS.

DIRECTING VERDICT. See APPEAL, 9, 13.

DISCONTINUANCE. See ACTION, 7.

DISCRETION.
Of common council. See MUNICIPAL CORPORATIONS, 2.
Judicial. See DAMAGES, 5. PLEADING, 1. WILLS, 2.

DISQUALIFICATION of judge. See ESTATES OF DECEDENTS, 1–3.

DIVORCE.

1. The fact that a man was of a sullen, morose, and fretful temperament and disposition, rendering him uncompanionable as a husband for months at a time, is *held* insufficient to sustain a divorce under subd. 5, sec. 2356, Stats. 1898, on the ground of cruel and inhuman treatment practiced by other means than acts of physical violence, where the only evidence that the husband's treatment was such as to render it unsafe for the wife to live longer with

him was her testimony that she brooded over her troubles until she became very nervous; that she took medicine for such nervousness; but that her health was good "except for such nervousness." *Johnson v. Johnson*, 186

2. In this case the refusal of the clerk to tax the costs on appeal against the respondent wife was reversed. *Ibid.*

DOCKETING of judgment. See DEEDS. FRAUDULENT CONVEYANCES, 10.

DRAINS. See WATERS, 2, 3.

EASEMENTS. See HIGHWAYS, 5–7. WATERS, 3.

EJECTMENT.

1. On the final settlement of an estate in 1885, defendants being parties to the proceeding and the court having jurisdiction of the subject matter and the persons, the county court found and adjudged that plaintiff's grantor was the legitimate child and heir of a deceased devisee under testator's will, and entitled to an interest in the real estate in question. In 1895, on application of defendants to set aside so much of the judgment of the county court as adjudged plaintiff's grantor entitled to a share in such real estate, the county court found that no fraud had been practiced, and reaffirmed its judgment. On appeal to the circuit and supreme courts, respectively, the judgment of the county court was in all things affirmed. In ejectment by plaintiff to recover his share of the estate, it was *held* that the judgment of the county court was *res adjudicata* as to the questions of the legitimacy and heirship of plaintiff's grantor. *Huebschmann v. Cotzhausen*, 64

2. Where, in ejectment, it appears from the undisputed evidence that the amount of rents and profits received by the defendants during the term of their adverse possession exceeds the amount paid by them for repairs, improvements, and taxes, it is not error to refuse a request to have the jury assess the value of the improvements made and taxes paid by them. *Ibid.*

3. In an action of ejectment a tenant of the adverse claimants who retains possession of the premises is a necessary defendant under sec. 3075, Stats. 1898, and should be joined in a writ of error to review a judgment against him and the other defendants; but a failure in that regard is not a defect going to the jurisdiction, but an irregularity which may, in the discretion of the court, be cured by amendment. *Ibid.*

4. A motion to dismiss or quash a writ of error because of such a defect will not be granted unless made soon after the case reaches the supreme court. *Ibid.*

ELECTION between remedies. See ACTION, 2. BUILDING AND LOAN ASSOCIATIONS, 6.

ELECTRIC STREET RAILWAY. See STREET RAILWAYS.

EMINENT DOMAIN. See RAILROADS, 2–5.

ENCROACHMENTS. See HIGHWAYS, 8.

EQUITY. See ACTION, 2, 8, 9. DEEDS. FRAUD. FRAUDULENT CONVEYANCES, 11. MORTGAGES, 7. PARTNERSHIP, 3. PARTITION. POOR LAWS, 2, 3.

ESTATES OF DECEDENTS.

See ACTION, 2–5. EJECTMENT, 1. FRAUDULENT CONVEYANCES, 11. MORTGAGES, 10–12. REFERENCE.

1. Under sec. 2447, S. & B. Ann. Stats., the use of the words "executor or administrator" in connection with the words "guardian of any ward" indicate that the person meant is some trustee charged with the duty of caring for the property or looking after some interest pending at the time the county judge is called upon to act, and such disqualification to act continues only so long as the county judge continues to be such executor, administrator, or guardian. *Richter v. Estate of Leiby,* 404
2. A guardian *ad litem*, being an attorney appointed to conduct or care for a particular matter in court, and having the charge neither of the person, nor of the property of the person, he is appointed to represent, is not a "guardian of any ward" within the meaning of said sec. 2447; and the fact that an attorney had been appointed guardian *ad litem* in an estate, his appointment being expressly limited to the particular proceeding then pending, does not disqualify him from acting in the same estate, when he became county judge three years thereafter. *Ibid.*
3. Said sec. 2447, being legislation upon a particular subject, must be presumed to have covered all the limitations considered necessary upon that subject, and therefore a proper construction of sec. 2579 confines the limitation therein prescribed to the county judge while acting in matters over which he has civil jurisdiction. *Ibid.*
4. An action to enforce the statutory liability of heirs for the debts of their decedent to the extent of property inherited by them from him is not an action on contract. *Adkins v. Loucks,* 587
5. If a person, possessed of property as heir of another, sell the same with intent to prevent the creditors of the estate of his decedent from resorting thereto for the payment of his claim under sec. 3274, Stats. 1898, and the vendee participate in such purpose, the sale is not protected by sec. 3285, but is voidable under sec. 2320. *Ibid.*

ESTOPPEL. See BUILDING AND LOAN ASSOCIATIONS, 2. HIGHWAYS, 6. JUDGMENTS, 6. MORTGAGES, 4. RAILROADS, 3. VOLUNTARY ASSIGNMENT, 10.

EVIDENCE.

See ACTION, 9. APPEAL, 5, 12–14, 16. ATTACHMENT, 2. BROKERS. DAMAGES, 1–3, 6, 7. EJECTMENT, 2. GUARDIAN AD LITEM. HIGHWAYS, 8, 15. LANDLORD AND TENANT, 2, 8. LIENS, 5. MASTER AND SERVANT, 9, 13. MORTGAGES, 1, 7, 9. MUNICIPAL CORPORATIONS, 6, 12, 13. RAILROADS, 5, 7, 8. SALE OF CHATTELS, 2. SETTLEMENT, 2. TRESPASS, 1. VENDOR AND PURCHASER, 3–6, 8, 10. VOLUNTARY ASSIGNMENT, 3, 4. WATERS, 1. WILLS, 1.

1. Where, in an action for amounts due for rent and for a suit of clothes, the plaintiff was examined simply as to the sale of the clothes, upon cross-examination it is error to allow, against objection, questions as to the receiving of checks by the plaintiff from the defendant at dates before the alleged sale. *Sullivan v. Collins,* 291
2. An affirmative defense of payment cannot be proven by cross-examination of a party when he has given no testimony as to the claim which is alleged to have been paid. Language used in *Weadock*

v. Kennedy, 80 Wis. 449, to the effect that a party may always be cross-examined on the whole case whenever he has testified as to any fact in the case, criticised, and *held* not to imply intention to depart from the rule that the cross-examination of a witness should be confined to matters brought out on the direct examination. *Ibid.*

3. While it is competent to show by cross-examination of one party that there was ill feeling between himself and the other, or that trouble had occurred between them, and the general character of the trouble, it is not competent for counsel to inject into the case, by statement and insinuation, charges of lying, theft, and perjury against the party undergoing cross-examination; and in case he does so the trial court distinctly fails in its duty unless it calls him to order at the outset and stops the objectionable remarks: the mere sustaining of objections, without fitting rebuke, is no adequate remedy for the evil. *Ibid.*

4. In an action for personal injuries alleged to be permanent, sustained by reason of a defective sidewalk, where the plaintiff's physician testified the injury might be serious, it is error to sustain an objection to a question put him on cross-examination, as to whether he regarded the injury as permanent. *Collins v. Janesville*, 46

5. Where all the records from which tabulated statements are compiled are before the court, and the witness who made the compilation testifies to their preparation from personal examination of the records, and that he believes the statements to be true, and the opposite counsel have ample opportunity to cross-examine the witness and inspect the records, such tabulated statements are properly received, not as an original, but as a part of the witness's, evidence. *Jordan v. Estate of Warner*, 539

EXCEPTIONS. See APPEAL, 4–11.

EXCESSIVE DAMAGES. See APPEAL, 20. DAMAGES, 3, 6.

EXECUTIONS. See FRAUD, 1. FRAUDULENT CONVEYANCES, 11. VOLUNTARY ASSIGNMENT, 7.

EXECUTORY CONTRACTS. See PARTITION. PARTNERSHIP, 2.

EXECUTORS AND ADMINISTRATORS.

See ESTATES OF DECEDENTS.

1. A special administrator, so long as he continues in office, is "the personal representative" of the deceased. *Swan v. Norvell*, 625

2. Under sec. 4256, Stats. 1898, a special administrator may bring an action for the wrongful death of his decedent, and, if his office terminates during its pendency the general administrator may be admitted to prosecute it to judgment. *Ibid.*

EXPERT TESTIMONY. See VOLUNTARY ASSIGNMENT, 4. RAILROADS, 7.

FENCES. See HIGHWAYS, 6–8. NUISANCES, 1.

FILING.
Of record on appeal from justice's court. See APPEAL, 21.
Of order laying out highway. See HIGHWAYS, 1.

FINDINGS. See APPEAL, 8, 12. CONTEMPT OF COURT, 1. FRAUDULENT CONVEYANCES, 2. MASTER AND SERVANT, 13. RAILROADS, 8.

FIRE INSURANCE. See INSURANCE, 1, 2.

FORCIBLE ENTRY AND DETAINER. See LANDLORD AND TENANT, 6–9. PLEADING, 2.

FOREIGN GUARDIAN. See GUARDIANS.

FORFEITURE. See CORPORATIONS, 5, 11, 12. INSURANCE, 4–8. VENDOR AND PURCHASER, 1, 2.

FRANCHISES. See CORPORATIONS, 1–12. CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS, 2–4. STREET RAILWAYS, 6.

FRAUD.

See ACTION, 4. BROKERS. ESTATES OF DECEDENTS, 5. FRAUDULENT CONVEYANCES. MORTGAGES, 1, 7. PARTIES, 2. PAYMENT. WILLS, 1.

1. Defendants having received $2,500 and R. $1,200 as the result of a conspiracy whereby C. was induced to sell his farm for less than its value, a suit was brought to rescind such sale and recover back the property. In such suit the court found the fraud and conspiracy, but, because the land was held by an innocent purchaser, refused the equitable relief of rescission, and rendered judgment against defendants and R. jointly as upon a cause of action in tort for money obtained by fraud. Defendants invested their $2,500 in the purchase of a homestead. The judgment creditors, having collected $1,200 from R., released the judgment as to him — reserving, except as to such sum, all their rights thereon against the other judgment debtors,— and assigned the judgment to plaintiff, a brother of R., under circumstances indicating that the transfer was for R.'s benefit. *Held* that, each judgment debtor being liable for the whole judgment without right to compel contribution, plaintiff could not follow the money received by defendants and impose a constructive trust upon the homestead purchased therewith, until he had exhausted his remedy by execution or shown futility of any effort to do so. *Roberts v. Moody*, 245

2. In an action by the assignee in such case to charge such homestead with a trust in his favor to an amount sufficient to satisfy the judgment, it is *held* that the same cause of action was presented as was presented in the former suit in equity, where the court decided just what the remedy should be and impliedly adjudicated against all other remedies, and that therefore the present action could not be maintained, it being *res adjudicata* that the plaintiff was not entitled to the relief demanded. *Ibid.*

FRAUDULENT CONVEYANCES.

See ACTION, 4. DEEDS. ESTATES OF DECEDENTS, 5. PARTIES, 2.

1. An intent to defraud creditors cannot be inferred from the fact that an insolvent debtor, by paying or securing one creditor, necessarily prevents other creditors from receiving anything or as much as they would otherwise receive. *Haring v. Hamilton*, 112

2. Whether a bill of sale was fraudulent as to creditors of the vendor being at issue, it is *held* upon the evidence that the court should have submitted to the jury in the special verdict, in some form, the question whether a sufficient consideration passed between the parties to the transaction. Absence of a finding upon that point rendered the special verdict incomplete. *Missinskie v. McMurdo*, 578

3. Under sec. 2310, Stats. 1898, the delivery and possession contemplated is not such a technical delivery as would give validity, *inter partes*, to a contract of sale, under sec. 2308, but such a delivery and change of possession that those familiar with the situation would naturally draw the inference of a change of ownership. *Ibid.*

4. Thus, under said sec. 2310, it was error to instruct the jury that if plaintiff, who claimed a threshing machine under a bill of sale from his brother, alleged to have been made in fraud of creditors, hired his brother to continue to run the machine, and the brother acted as the servant or agent of the plaintiff, then the jury should find the "real possession" was in the plaintiff. Such instruction is diametrically opposed to the statute. *Ibid.*

5. Judgment having been rendered against plaintiff's brother, a threshing machine in the debtor's possession was seized on execution issued on such judgment. Plaintiff replevied the machine, claiming title under a bill of sale from his brother, but the transaction between plaintiff and his brother had not been accompanied by an immediate delivery of the machine, followed by an actual and continued change of possession. *Held* that, under sec. 2310, Stats. 1898, the presumption of fraud as against creditors arose, and that the burden of proof rested on the plaintiff to remove that presumption. *Ibid.*

6. Relationship between the parties to a bill of sale, while not necessarily a badge of fraud, is properly to be considered as a circumstance in deciding whether the transaction was in good faith or with a hidden purpose of defrauding creditors of the grantor. *Ibid.*

7. Where one of the questions of a special verdict was whether the plaintiff ought to have known that the transactions whereby he obtained title to the goods of a debtor were for the purpose of preventing the debtor's creditors from or delaying them in collecting their claims, a requested instruction to the effect that a sale is void where the object of the debtor is to hinder and delay, if made to one having knowledge of the intent, and that such knowledge need not be actual, but will be inferred from facts and circumstances sufficient to raise a suspicion, or put him on inquiry, informs the jury of the legal effect of their answer to a portion of the special verdict, and its refusal is not error. *Ibid.*

8. It is not error to refuse to instruct the jury that, if a purchaser of chattels knew the seller was largely indebted and pressed by creditors, then it was his duty to see that the purchase price was applied to the seller's debts; no such duty rests on the purchaser unless, by reason of other facts, he is chargeable with complicity in a fraud which would avoid the purchase. *Ibid.*

9. The word "void," in sec. 2320, Stats. 1898, relating to fraudulent conveyances of property by debtors, means voidable. *French Lumbering Co. v. Theriault,* 627

10. A deed of real estate made under such circumstances as to fall within the condemnation of sec. 2320, Stats. 1898, nevertheless passes title to the property to the fraudulent vendee, so that a judgment thereafter rendered on a precedent debt of the vendor and duly docketed does not become a specific lien on the land under sec. 2902, which provides that a money judgment, docketed in the office of the clerk of the circuit court of a county, shall be a lien on the real property of the judgment debtor in such county. *Ibid.*

11. Under such circumstances as those stated in No. 10:

(a) A judgment creditor can obtain a specific lien on the real property of the judgment debtor by levy thereon under an execution issued on the judgment, and then equity will aid him to remove the impediment to an advantageous sale thereof and enforcement of the lien created by the fraudulent transfer.

(b) Equity will not aid a judgment creditor till he actually obtain a specific lien by attachment of the property under writ of attachment or levy thereon under an execution, or he has exhausted all his legal remedies to collect his claim. The last condition mentioned being satisfied, equity will enforce the creditor's right to a lien on the property in an action to annul the fraudulent transfer of the property so that the judgment may attach thereto.

(c) If the fraudulent vendor die before a specific lien shall have been obtained on the property, the judgment cannot be enforced by execution against such property under sec. 2978, Stats. 1898, and a lien be thereby secured which equity will protect. *Ibid.*

FRAUDS, STATUTE OF. See VENDOR AND PURCHASER, 3, 5, 8, 10, 11.

GARNISHMENT.

See COSTS, 1-5.

1. Plaintiff moved to strike out the answers of garnishees, upon which he had elected to take issue, for the reason that they had not been properly filed as required by sec. 2664, Stats. 1898. On the hearing of such motion it appeared that the answers had been filed on the first day of the first term after the action had been duly noticed for trial. *Held* that, in the absence of anything in the record to indicate that such answers were not filed before the opening of court on that day, and in view of the court's order on such motion that they be permitted to stand and a finding that the action duly came on to be heard, there was no error in refusing the motion. *Evans v. Rector,* 286

2. By the terms of a will G. was given a sum of money, but in case ten years should elapse without advices as to his existence the sum was to be divided between R. and A., who were appointed trustees of the fund by the proper county court, required to account therefor to such court, and gave bonds for the faithful performance of the trust. No advices having been received from G. for about six years, plaintiffs brought suit against G. and garnished R. and A. *Held*, that G. had no vested interest in or absolute right to the fund at the time of the service of the garnishee process, and that, under sec. 2768, Stats. 1898, the garnishees were not liable. *Ibid.*

3. Such fund is in the custody of the law and under the control of the court, and cannot be reached by garnishment of such trustees. *Ibid.*

GENERAL CITY CHARTER. See MUNICIPAL CORPORATIONS, 1.

GOOD FAITH. See BROKERS, 2. VOLUNTARY ASSIGNMENT, 1.

GUARANTY.

See APPEAL, 17.

1. Defendant having signed a letter of guaranty on condition that it should not be delivered until another surety was obtained, the principal delivered it in violation of such condition, and the guarantor, when notified by the guarantee's agent that credit would be extended on it, told such agent of the wrongful delivery. Thereafter the agent was permitted to take the letter away without protest. The guarantor called attention to the provision enabling him to withdraw therefrom if dissatisfied. He told such agent he thought it would not be necessary for him to do so as he had faith in his principal's business ability. Such agent thereafter frequently called on the guarantor, and they talked about how the principal

was getting along in his business. *Held*, that there was no waiver of the guarantor's right to insist upon the effect of his notification of the conditional delivery. *New Home Sewing Machine Co. v. Simon*, 368

2. Where, in an action on a letter of guaranty delivered on condition that another signer should be obtained, the supreme court decided that, when knowledge came to the plaintiff that the letter had been wrongfully delivered, it had no right to ignore the fact; that proceeding thereunder was at its peril; that unless the guarantor was guilty of some act that would amount to an estoppel, it was without remedy; and that the fact that its agent notified the guarantor that it would extend credit to H., whose obligations were thereby guaranteed, did not call for any protestation from him that he would not be bound thereby,—it was error for the trial court on a second trial, on substantially the same evidence, to instruct the jury that, if the defendant signed the letter and was thereafter notified of its acceptance by plaintiff, it thereupon became a binding contract of guaranty according to its terms; and that if defendant intended to insist upon the condition upon which he signed the letter, it was his duty to notify the plaintiff that he would not be responsible unless another signature was obtained. *Ibid.*

3. Under subd. 2, sec. 2307, Stats. 1898, an indorsement on a promissory note, "I hereby guaranty the payment of the within note," signed by the guarantor, is void because it fails to express any consideration. *Taylor v. Pratt*, 3 Wis. 674, and *Parry v. Spikes*, 49 Wis. 384, followed. *Commercial Nat. Bank v. Smith*, 574

4. R. and S., respectively the payee and guarantor of a note, were stockholders in a corporation in which R. held a controlling amount of stock. S. purchased some of R.'s stock on his own account, and G., the maker of the note, purchased the remainder, neither having any interest in the shares of the other. In payment G. gave the note in suit, indorsed by S., but the indorsement failed to show any consideration. *Held*, that the incidental benefit, if any, which might accrue to S. by having R. out, and G. in, as a stockholder of the corporation, did not amount to a new and independent consideration passing between newly contracting parties, and independent of the original contract, so as to take the guaranty out of the statute of frauds (subd. 2, sec. 2307, Stats. 1898). *Ibid.*

GUARDIAN AND WARD.

A foreign guardian has no greater authority over the estate of his ward in this state, after filing a certified copy of his appointment in the probate court, than a general guardian appointed by a court in this state. He cannot sell the real estate of his ward here situated under his general authority, but must obtain special authorization therefor as provided by law in case of other guardians, and a sale otherwise made will not affect the title attempted to be transferred. *Adkins v. Loucks*, 587

GUARDIAN AD LITEM.

See ESTATES OF DECEDENTS, 2.

[Whether, the allegation of the appointment of a guardian *ad litem* in an action by a minor being denied and no proof being offered to

support it, the cause of action fails, not decided.] *Hudson v. Northern Pacific R. Co.* 620

HEIRS and next of kin, actions and proceedings by and against. See ACTION, 3-5. ESTATES OF DECEDENTS, 4.

HIGHWAYS.

See STREET RAILWAYS. TAXATION, 7, 8.

To lands excluded from access.

1. Construing sec. 1275, Stats. 1898 (providing that, whenever the supervisors of a town shall lay out a highway to lands excluded from access to any other highway, the amount assessed as advantages against the applicant shall be paid to the town treasurer before the order laying out such highway shall be filed), in connection with the provisions of sec. 1269 that the order laying out such highway, together with the award of damages, shall be filed within ten days after the day fixed for deciding on the application, no legal filing can take place until such assessment has been paid. Hence, in such a proceeding, where the advantages assessed against the applicant were not paid to the town treasurer until thirteen days after the hearing, the supervisors are deemed to have decided against the application. *State ex rel. Giblin v. Sup'rs of Union*, 68 Wis. 158, followed. *Baier v. Hosmer*, 380

2. The provisions of sec. 1275, Stats. 1898, that, on laying out a highway to lands excluded from access to any other highway, the advantages assessed against the applicant shall be paid to the *town treasurer*, are mandatory: it is not a substantial compliance with the statute to pay the sum assessed to the *chairman of the town board*. *Ibid.*

Laying out: Proceedings.

3. Where an application has been made to the town board to lay out a road across the land of a citizen of this state upon whom notice thereof, making him a party to the proceedings, was given under sec. 1267, Stats. 1898, he is competent to appeal from the decision of the board thereon under sec. 1276, even though he is not a resident of the town. *State ex rel. Curtis v. Town Board of Geneva*, 1

4. Where the decision of the town board, or of commissioners, to lay out a highway was not procured or induced by private contributions or offers of pecuniary aid towards the construction of the road, such contributions do not vitiate the decision. *Ibid.*

Dedication: Easements.

5. While the rule is general that, to charge a municipality with obligations arising from the use of dedicated streets, there must be an acceptance and opening or use equivalent thereto, a different rule prevails when the contest is between the owner of a plat, who has sold lots with reference thereto, and his grantee. *McFarland v. Lindekugel*, 474

6. A grantor of defendant laid out an addition to an unincorporated village, and defendant sold plaintiff two lots thereof, all the conveyances after the plat, including that to plaintiff, being made by lots and blocks according to the plat. The streets of the plat were, by an order of the town board duly recorded, declared to be highways of the town, but after that time were never opened, traveled, or worked. After plaintiff's purchase defendant fenced up the street in front of plaintiff's lots. *Held* that, such street being ap-

purtenant to plaintiff's lots, the owner of the plat and his successors in estate were estopped from claiming the street was not such; and that the maintenance of such fences was a direct invasion of plaintiff's rights, which, by reason of such estoppel, defendant could not be heard to justify. *Ibid.*

7. In such case the fact that, after the commencement of the suit and before trial, the defendant removed the fence cannot affect the plaintiff's right to a judgment enjoining the maintenance of the fence, otherwise the defendant might again insist upon the right to replace and maintain it. *Ibid.*

Encroachments.

8. A fence having been erected by defendant on a line laid out by a surveyor as the proper location of the east line of the block in which his premises were situate, it appeared, in an action to compel the removal of the fence on the ground that it encroached on the highway, that, on the plat containing such block, there were no natural landmarks referred to; that the plat was imperfect and contradictory; and that no monument or original stake was in existence from which the lines of the original survey could be located; but the uncontradicted evidence as to the location of ancient fences, marking other lot and street lines in the same block, showed the line claimed by the plaintiff to be the east line of the block as originally surveyed. *Held*, that such evidence could not be overcome by mere measurements of distances from the base line as shown by the plat, and that a judgment of removal of the encroachment was proper. *Galesville v. Parker*, 363

Obstructions. See MANDAMUS, 1-3.

Injuries from defects. See DAMAGES, 7. INSTRUCTIONS TO JURY, 2.

9. In an action against a town to recover for the death of plaintiff's intestate, the complaint alleged that the road where the accident occurred was a public highway. The answer, while admitting the existence of a wagon road at the place in question, alleged want of sufficient knowledge or information to form a belief as to whether the road was a legally laid out highway, or whether the defendant was in duty bound to keep it in repair, and therefore denied the same. *Held*, insufficient to raise an issue as to whether the *locus in quo* was a public highway. Towns should be held to know what roads within their limits are public highways. *Carpenter v. Town of Rolling*, 559

10. Whether a large log lying at right angles with the traveled track, one end being within a few inches of such track, constitutes a defect in the highway is a question for the jury, even though there was at that point a smooth road about ten feet in width. *Ibid.*

11. In an action to recover for the death of plaintiff's intestate, alleged to have been caused by a defective highway, it appeared, among other things, that deceased was found dead on the highway, evidently the result of a fall from his wagon; that about forty-eight feet back of where the body was found there was a large log lying nearly at right angles to the track, one end being within a few inches of the east track: that about eight inches from the end of the log there was a fresh mark, apparently of a wagon wheel, with a wagon track leading to it; and that the team and wagon of deceased were found about forty-five rods further on, standing by the side of the road. *Held*, that the questions whether deceased was thrown from his wagon by reason of its striking the log, and whether his death resulted from the injuries received in his fall, were for the jury. *Ibid.*

12. Under sec. 1339, Stats. 1898, notice of a claim against a town for damages for the death of a person occasioned by a defective highway need not be signed by the administrator of the deceased, but may be given by the beneficiary to whom the damages will accrue in case of recovery. *Parish v. Eden*, 62 Wis. 272, followed. [Whether such notice is necessary in case of an action for death under secs. 4255, 4256, not determined.] *Ibid.*

13. The notice required by said sec. 1339, Stats. 1898, may be given by the delivery of a duplicate original. *Ibid.*

14. In view of the fact that the liability for accidents upon highways is purely statutory, and that the statute creating it (sec. 1339, Stats. 1898) provides for recovery in case of damage caused by "the insufficiency or want of repairs" of any bridge or road, it is better, in submitting to the jury the question of liability, to use the statutory terms, rather than to attempt to use other expressions that may be substantially equivalent. *Ibid.*

15. In an action to recover for the death of a man who had been thrown from his wagon and killed while driving home from town on a load of feed, the evidence — stated in the opinion — is *held* insufficient to sustain findings of the jury that he was not intoxicated, and that he was capable of exercising ordinary care. *Ibid.*

HOMESTEAD. See FRAUD.

HUSBAND AND WIFE. See DEBTOR AND CREDITOR. DIVORCE. MARRIED WOMEN. VENDOR AND PURCHASER, 7.

HYPOTHETICAL QUESTIONS. See VOLUNTARY ASSIGNMENT, 4.

IMPLIED AUTHORITY. See MORTGAGES, 4.

IMPLIED CONTRACT. See BROKERS, 3.

INCORPORATION. See RAILROADS, 1. VILLAGES.

IN CUSTODIA LEGIS. See GARNISHMENT, 3.

INDORSEMENT. See GUARANTY, 3.

INFANTS. See GUARDIAN AND WARD. GUARDIAN AD LITEM. MASTER AND SERVANT, 1, 9–14. PARENT AND CHILD.

INJUNCTION.

See CONTEMPT OF COURT, 1. HIGHWAYS, 7. LANDLORD AND TENANT, 3. PLEDGES. STREET RAILWAYS, 6, 7. WATERS, 1.

1. A motion to vacate a preliminary injunction is properly denied, where it appears from the complaint and the papers used upon such motion, that either or any of the plaintiffs was legally entitled to have the injunctional order maintained pending the action. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493

2. The true object of a preliminary injunctional order, both at common law and under the statute (sec. 2774, Stats. 1898), is to prevent the commission of some act, "the commission or continuance of which during the litigation would produce injury to the plaintiff." The extent of the necessity marks the extent of the right to enjoin. *Ibid.*

INSANE PERSONS. See DEEDS.

INSOLVENCY. See CORPORATIONS, 13–15. DEBTOR AND CREDITOR. VOLUNTARY ASSIGNMENT.

INSTRUCTIONS TO JURY.

See FRAUDULENT CONVEYANCES, 4, 7, 8. GUARANTY, 2. HIGHWAYS, 14. MASTER AND SERVANT, 8, 9, 11. MUNICIPAL CORPORATIONS, 10, 11, 15, 16.

1. When a special verdict is to be rendered, instructions, whether asked by the parties or given by the court, appropriate to each question, should be submitted to the jury in immediate connection with the question to which they are, respectively, applicable, and a failure in that regard is error. Instructions only applicable to a general verdict should not be given. *Rhyner v. Menasha,* 201

2. Sec. 20, subch. VIII, of the charter of the city of Menasha (ch. 123, Laws of 1891) provides that the city shall not be liable for damages for injuries from defective streets, unless it be shown that one of the aldermen had actual knowledge of the defect, or unless the defect shall have existed three weeks, provided that knowledge shall not be presumed from the lapse of such period. *Held,* that actual knowledge not being relied upon and the existence of the defect being for the jury, an instruction to the jury that if they found the defect had existed for three weeks prior to an injury therefrom they might presume and find the city had knowledge thereof, is erroneous: the instruction should have been so framed as to permit the jury to find whether, under all the facts and circumstances of the case, the conditions were such as to bring constructive notice home to the city. *Ibid.*

3. In an action on contract, where plaintiff's claim was old and subject to the criticism that it was stale, but there was enough testimony in its support to entitle it to be fairly submitted to the jury, an instruction that, if the action was merely an attempt to defraud, hinder, and oppress the defendant, the jury should find for the defendant, is *held* not justified by the evidence and distinctly misleading. *Sullivan v. Collins,* 291

4. Such an instruction, if proper in any case, should not be given without a sufficient qualification to inform the jury that, if the plaintiff has proven his cause of action, he should recover notwithstanding his motive in bringing the action was to oppress the defendant. *Ibid.*

5. The rule that, where a mistake is made in giving instructions to the jury, thereafter so fully corrected as to leave no reasonable ground to say that they have been misled, or where an instruction upon a material point is susceptible of two constructions, one a correct statement of the law and the other not, but taking the charge as a whole there is no reasonable ground to say that the jury may have adopted and applied the latter, the error cannot be taken advantage of to reverse the judgment, does not relate to cases where the whole or some essential part of the controversy was covered by erroneous instructions requested by one party and then again covered by correct instructions requested by the opposite party; or to cases where conflicting instructions are given on material points, leading to uncertainty as to what rules of law are applicable to the case. *New Home Sewing Machine Co. v. Simon,* 368

6. In an action for personal injuries sustained by a child thirteen years of age, an instruction that ordinary care means such care "as the great mass of ordinarily prudent children of her age and capacity exercise under like circumstances," is erroneous, because it subdivides the class of ordinarily prudent children, and makes the

action of one division of the class the test of ordinary care. *Collins v. Janesville,* 436

7. An instruction, in substance, that the injury must be shown to be the *direct* and natural result of the defect, is also erroneous; the instruction should be to the effect that the injury must be the natural *and probable* result of the defect. In such an instruction the word "direct" has no proper place. *Ibid.*

8. An instruction that proximate cause is that from which the result follows as the natural and probable consequence,— probably from the standpoint of the person who is charged with the lack of ordinary care claimed as the cause of the result complained of,— is erroneous. He is chargeable with such consequences as a person of ordinary intelligence and prudence ought reasonably to have foreseen would follow as the natural and probable result of his acts. *Hudson v. Northern Pacific R. Co.* 620

INSURANCE.

See APPEAL, 1, 2. VOLUNTARY ASSIGNMENT, 2–4.

Fire.

1. Plaintiff applied to R., an insurance agent, for insurance on its sawmill. Being unable to place the risk, R. applied to C., defendant's agent, and procured a policy in defendant to be issued on the mill, the policy containing a provision for cancellation by defendant on giving five days' notice. When the issuance of the policy was reported to the home office, defendant immediately notified C. to cancel it. C. in turn notified R. of the cancellation, and R. notified plaintiff, requesting a return of the policy, and stating that he would attempt to procure other insurance. Plaintiff forwarded the policy by mail to R., who received it three days after the receipt of notice of cancellation, but an hour and a half after a loss had occurred, and retained it in his possession until suit was brought thereon. *Held,* that the policy was in force at the time of the loss, there being no showing of any intention to consent to immediate cancellation, and R.'s acts being in harmony with a continuance of the policy until canceled at the end of five days pursuant to its terms. *Wicks Bros. v. Scottish Union & Nat. Ins. Co.* 606

2. The right to cancel a policy of insurance does not exist at all except by contract, and stipulations to that effect are to be construed with reasonable strictness. *Ibid.*

Life: Mutual benefit societies.

3. In an application for insurance in a mutual benefit company the insured affirmed and declared that the several answers contained therein were each and all true, and that he had made no intentional omission, concealment, or mental reservation of any material fact or circumstance relating to his past or present health, habits, or condition, or to his family history, and agreed that such questions and answers should form part of the contract. The certificate recited that it was issued in consideration of the agreements and statements contained in said application and in the medical examination paper, and also in consideration of the warranty that the same, being material to the risk, were in all respects true and correct. In an action on the certificate the jury found that the answers of the insured to questions in said application concerning the health, death, and age at death, of his ancestors,

brothers, and sisters, were false. On a former appeal said questions had been held material to the risk as matter of law. *Held*, that the positive answers of the insured to said questions constituted warranties, and that, being false, no recovery could be had on the certificate, even though the jury also found that each of said answers was made without any "intentional omission, concealment, or mental reservation" on the part of the insured. *McGowan v. Independent Order of Foresters*, 462

Live-stock insurance: Policy: Forfeiture: Waiver.

4. Where an insurance policy on a horse contained a provision that, in case of sickness, the insured should *at once* notify the company by telegram, otherwise the policy to be void, the fact that the horse took sick in the morning of Sunday, and died in the afternoon of that day, and that there was no telegraph station nearer than nine miles, is insufficient to excuse failure to comply with that stipulation of the policy. *Johnston v. Northwestern L. S. Ins. Co.* 337

5. In such case the agreement as to notification is in the nature of a promissory warranty, which must be strictly fulfilled before there can be a recovery; and nothing short of impossibility of fulfillment can excuse its breach. *Ibid.*

6. In such case the question of the materiality or usefulness of the agreement to notify the insurance company *at once* by telegraph in case of the sickness of the horse, is not open to be submitted to the jury. *Ibid.*

7. Action having been brought on an insurance policy covering a horse incumbered by a mortgage for $800, it appeared that, in the application for such policy, it was stated that the horse was mortgaged for $500, and that such statement was warranted to be true. It further appeared that after delivery of the mortgage and before the insurance was effected the mortgagor had paid $300 or more to the mortgagee, who at once applied the payment on other indebtedness due him from the mortgagor. It did not appear that the mortgagor made or attempted to make application of such payment upon the mortgage. *Held*, that the evidence showed without dispute that the amount of the incumbrance was $800 and interest: and that a question in the special verdict. What was the amount of the incumbrance on the horse at the date of making the application for the policy in suit? should have been answered by the court instead of being submitted to the jury. *Ibid.*

8. In such case the insured testified that he told the agent the incumbrance was *about* $500, and remembered nothing further that was said in regard thereto. *Held* that, in the absence of the further statement by the insured that he did not know the amount of the incumbrance, together with the knowledge of the agent who wrote the amount into the application that assured did not know it and was not pretending to state it, the statement in the application was not a representation merely, but a warranty, which, being clearly breached, avoided the policy. Language in *Johnston v. Northwestern L. S. Ins. Co.* 94 Wis. 117, *held* not to have been intended as a decision that, if the insured said "about $500," it would be a representation merely, but if he said "$500," it would be a warranty. *Ibid.*

Suretyship insurance. See APPEAL, 1, 2.

INTEREST.

1. In actions for damages for breach of warranty, for breach of contract for the delivery of chattels, for the wrongful conversion of chattels, for the wrongful destruction of property, etc., the plaintiff, if he recovers, is entitled to interest from the time of the breach or the commission of the injury, not *as such*, but *as compensation* for the delay, and in order that he may be fully remunerated for his injury. *J. I. Case Plow Works v. Niles & Scott Co.* 9

2. Where the date when the debtor ought to have paid is fixed by agreement, it is error to allow interest from a date before that time. *Smith v. Putnam*, 155

3. Where plaintiff in one of the transactions of the partnership turned in certain logs of his own, it is error to allow him interest on the price thereof, in the absence of an agreement that he should receive interest on any contributions he should make. *Ibid.*

4. In an action on a contract, breached by failure to accept and pay for goods contracted for, interest may be allowed, not as interest strictly so called, but as part of plaintiff's damages, and as necessary to give complete indemnity for the breach of the contract. *McCall Co. v. Icks*, 232

5. Sec. 1692, Stats. 1898, which requires the plea of usury to be supported by proof of a tender of the principal of the debt as a condition of relief from a usurious contract, and the rule that usury, to be available, must be pleaded, are satisfied by the fact that the usurious contract is set forth in the complaint, which clearly shows the invalidity as to interest, and that the principal of the indebtedness was, long before the commencement of the action, fully paid by credits the debtors received or were entitled to receive from the creditor. *Jordan v. Estate of Warner*, 539

6. Town orders do not bear interest unless the electors of the town, by vote taken pursuant to the authority of ch. 325, Laws of 1899, so declare. *Mueller v. Town of Cavour*, 599

INTOXICATION. See HIGHWAYS, 15. MUNICIPAL CORPORATIONS, 11-13.

JOINDER.
Of causes of action. See ACTION, 1-3, 5.
Of defenses. See MANDAMUS, 4.

JUDGMENTS.

See EJECTMENT, 1. FRAUD. HIGHWAYS, 8. LIENS, 8. PARTNERSHIP, 3. WILLS, 3.

Final judgment: What must cover.

1. Save cases where interlocutory judgments are allowable under the special provision in sec. 2883, Stats. 1898, but one final judgment is permissible in any action. In that the rights of all the parties must be adjudicated. *Adkins v. Loucks*, 587

Docketing. See DEEDS. FRAUDULENT CONVEYANCES, 10.

Lien of. See DEEDS. FRAUDULENT CONVEYANCES, 10, 11.

Offsetting judgments.

2. The fact that judgments are in different courts will not prevent their being offset, if the applicant applies to the court where the judgment against him exists, since such court may make the satisfaction of its own judgment conditional upon the satisfaction by

the applicant of the judgment in his favor in the other court. *Welsher v. Libby, McNeil & Libby,* 47

3. Where a judgment has not been appealed from or attacked within the time limited therefor, it must be given conclusive effect on an application to set it off against the judgment in another action between the same parties. *Ibid.*

4. The fact that a plaintiff against whom a judgment for costs has been rendered has commenced another action against the defendant for a larger amount will not prevent said judgment being offset against a judgment in favor of the defendant, since the latter judgment would be a proper setoff or counterclaim against such demand as the plaintiff holds against the defendant. *Ibid.*

5. In January, 1892, in proceedings to assess damages for a wrongful attachment, a judgment in favor of the defendants for their disbursements only, with costs, was rendered on a special verdict, which, on February 5, 1895, was held erroneous by the supreme court and a judgment ordered for full damages. On February 17, 1895, defendants assigned the judgment already rendered in their favor, and any judgment to be entered, to their attorneys as security for their fees and disbursements in the attachment action. On March 22, 1895, the plaintiff in the attachment action commenced an action to offset the judgment in that suit against a judgment in his favor for deficiency on mortgage foreclosure, obtained March 1, 1892; and two days later said attorneys notified him of the assignment to them. On January 29, 1897, judgment was formally entered in the attachment action as directed. *Held,* that said assignment gave the attorneys a valid lien on the claim for damages, which attached to the judgment as soon as entered and was superior to plaintiff's right of setoff. *Stanley v. Bouck,* 225

6. The commencement of the action to obtain the setoff in such case, before notice of the assignment, was not such a change of position as raises an estoppel *in pais.* *Ibid.*

Res adjudicata. See APPEAL, 16–18. EJECTMENT, 1. FRAUD, 2. GUARANTY, 2. WILLS, 5.

Reversal on appeal. See APPEAL, 19.

JURISDICTION. See ACTION, 7. APPEAL, 1. CORPORATIONS, 8, 10. COURTS. EJECTMENT, 2. LANDLORD AND TENANT, 6. RAILROADS, 4, 5. VILLAGES.

JUSTIFICATION of sureties. See APPEAL, 1.

JURY. See APPEAL, 13. COURT AND JURY. DAMAGES, 4, 5, 7. HIGHWAYS, 10, 11. INSURANCE, 6, 7. MUNICIPAL CORPORATIONS, 12. VENDOR AND PURCHASER, 8.

JUSTICES' COURTS. See APPEAL, 21. LANDLORD AND TENANT, 6.

LACHES. See BUILDING AND LOAN ASSOCIATIONS, 6. MORTGAGES, 6.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See BILLS AND NOTES, 1. PLEADINGS, 2.

Leasehold: Estate demised.

1. Appurtenances of ingress and egress essential to the use of leased premises and reasonably within the contemplation of the parties at the time of the leasing are as much a part of the estate conveyed as the premises specifically described. Thus, where a pas-

sageway and door connecting the office of an hotel with a room in the same building leased for a saloon or bar room existed at the time of a renewal of the lease and were essential to the proper use and enjoyment of the demised premises, the right to use them became part and parcel of the leasehold interest and could not lawfully be interfered with by the lessor or his grantees during the term. *Shaft v. Carey,* 273

2. After the demise of a room in a hotel for a saloon for the term of one year, which was renewed for four years, changes were made whereby the demised room was connected by a door and passageway with the hotel office. There was no agreement in the lease as to such door and passageway or their use in connection with the demised premises. *Held* that, basing his right to relief upon his lease, the tenant could not maintain an action against the landlord for closing the door and passageway unless it definitely appeared that they existed when the lease was renewed. *Ibid.*

3. Where a tenant leased for a saloon a room adjoining the office of his landlord's hotel, with the exclusive privilege of selling liquors and cigars in the hotel block, and the landlord built an annex to the hotel, adjoining the office, used the side of the hotel block as a wall for the new erection, cut a doorway from the hotel office into the annex, and closed the one leading into the room occupied by the tenant, the annex became a component part of the hotel block, and its construction was a mere subterfuge to avoid the consequences of the restrictions of the lease, and entitled the tenant to enjoin the selling of liquors and cigars therein. *Ibid.*

Action by tenant: Negligence of landlord.

4. Where a married woman made a lease of certain premises for and on behalf of her husband, she cannot maintain an action to recover for injuries caused by defective steps, based on the existence of a contract relation between herself and the landlord whereby he agreed to repair the steps and his failure to perform such agreement: her action to recover for such injuries must be sustained, if at all, as an action for negligence. *McGinn v. French,* 54

5. Where the tenant knew that the stairway in such case was out of repair and dangerous, and that it could be repaired at a trifling expense, but, before being injured thereon, continued to use it for more than a year without repairing it, and neglected to insist on the alleged promise of the landlord to make the repairs, such continued use was at the tenant's risk, and hence relieved the landlord from liability to respond in damages for the accident. *Ibid.*

Forcible entry and detainer.

6. In an action for unlawful detainer, the complaint, being in the form prescribed by law, confers jurisdiction of the subject matter. The summons is merely the means of acquiring jurisdiction of the person, and an objection that it is not in the form prescribed by law is waived by appearing generally without objection to the jurisdiction over the person. *Brauchle v. Nothhelfer,* 457

7. A notice to a tenant who was in default in the payment of rent was *held* to satisfy the statute (sec. 3358, Stats. 1898), which requires that the notice shall demand in the alternative the payment of the rent or the possession of the premises. *Ibid.*

8. Where there was no pretense that a notice to a tenant to pay rent or surrender possession of the premises was not served as specified in the return of an officer indorsed thereon, its admission without objection, and its confirmation by the testimony of the officer,

proved, *prima facie*, the service of the notice, even though the return might have been inadmissible if objected to. *Ibid.*

9. Where a lease provided that, in case the landlord desired to sell the premises during the term, the tenant should have "the first privilege of buying said property" at a certain sum, there was nothing in this promise,—the contingency giving the right to exercise such option not having arisen, and the tenant not having parted with any value or otherwise changed his position by reason of it,—which gave him any rights in the premises save such as he held as tenant under the lease. *Ibid.*

LEGISLATIVE GRANT. See CORPORATIONS, 2, 3.

LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 2.

LIBEL AND SLANDER.

1. An article in a newspaper charging plaintiff with selling without any license, a compound in imitation of pure yellow butter, which contained an admixture of foreign fat, is not libelous: neither secs. 4607*c*, 4607*d*, Stats. 1898, nor any other statute of Wisconsin, makes sale of imitation butter or of oleomargarine criminal or prohibited because sold without license from the state, nor can it be said that, independently of any such law, absence of license renders disgraceful or discreditable sales otherwise innocent. *Dabold v. Chronicle Publishing Co.* 357

2. An article in defendant's newspaper which charged that plaintiff had sold adulterated butter *as of pure creamery make*, that the commodity was forty per cent. butter and the balance grease, and that purchasers had been misled, is libelous. It charges deceitful dealing in adulterated or imitation butter, absolutely prohibited by sec. 4607*c*, Stats. 1898, which makes such acts a crime, and the acts so charged also involve moral turpitude in their perpetrator, both as an individual and as a dealer in commodities owing a duty of honesty and good faith to his customers. *Ibid.*

3. Under sec. 2677, Stats. 1898, an allegation that defendant published an article in its newspaper, charging the D. P. Co. (meaning plaintiff) with having sold adulterated butter as pure creamery make, is sufficient, on demurrer, to show that the acts charged referred to plaintiff. *Ibid.*

4. In an action for libel, a positive allegation that the defendant falsely and maliciously caused to be printed and published in a certain newspaper a certain libelous article concerning the plaintiff, is sufficient, on demurrer, to charge defendant with such control over matter inserted in the newspaper as to make it liable therefor. *Ibid.*

LICENSE. See MANDAMUS, 4.

LIENS.

Of attorneys at law. See JUDGMENTS, 5.

Of mechanics, etc., for labor and material. See CONTRACTS, 2.

1. The right to a mechanic's lien, under ch. 143, Stats. 1898, for work done in the construction of a building is not dependent upon whether a building is actually constructed, but whether such construction is commenced. If the latter circumstance occur, and lienable work be done in aid thereof, the right of lien thereby becomes perfect and cannot thereafter be defeated by any act of the proprietor. *Fitzgerald v. Walsh,* 92

2. Indebtedness from the proprietor and commencement of the work being the two things necessary, under sec. 3314, Stats. 1898, to give a right to a lien, an architect who makes plans and specifications for a contemplated building is entitled to a lien therefor, where the construction of the building according to such plans is commenced, although the use of them is abandoned before anything is done except a part of the excavation for the basement. *Ibid.*

3. In an action to enforce a mechanic's lien, it appeared that plans and specifications made by plaintiff for a contemplated building, after delivery to defendant, were used by him in negotiating with contractors and in setting stakes indicating the boundaries, and that thereafter part of the excavating for the basement was done before the use of the plans was abandoned. *Held*, that there had been an acceptance of the plans, which, with the commencement of the construction of the building, gave plaintiff a lien thereon. *Ibid.*

4. The owner of a well-boring machine used in the construction of a well, who had hired it to the contractor, is not entitled to a subcontractor's lien for its use under sec. 3315, Stats. 1898, giving subcontractors a lien on the land on which a well is constructed for *work or labor* performed or *materials* furnished in digging it. *McAuliffe v. Jorgenson*, 132

5. Where every reasonable probability, except E.'s denial, tended to show that J. and E. were partners in digging a well, such denial is *held* to have been so weakened by his admissions and want of frankness and by the evasive and equivocal character of his testimony on cross-examination, as not to support a judgment giving him a subcontractor's lien. *Ibid.*

6. The lien for the construction of a well being limited to one acre where the land is situated in a city, it is error in such a case to single out and adjudge a lien upon any given portion of a tract containing several acres, in the absence of evidence locating the well upon any specific acre. *Ibid.*

On logs and timber.

7. Under lien statutes services of almost any character which are performed as a part of, and as mere incidents in, the work for which a lien is given, are protected, although the same kind of services, performed independently of the lienable work, are not entitled to a lien. *Carpenter v. McCord Lumber Co.* 611

8. Plaintiff performed labor for a railway company in building and keeping in repairs its railway, which was constructed for reaching and hauling all timber tributary thereto, including that of the defendant corporation, which railway was removed to reach other general regions of country only after the exhaustion of timber in that of its original construction. Logs of the defendant corporations were hauled out on such railroad, and plaintiff having taken the formal steps for establishing a lien under sec. 3329, Stats. 1898, conferring the right to a lien for "labor and services in cutting or hauling . . . logs, timber," etc., brought this action to enforce his claim for lien. *Held*, that he was not entitled to a lien for his services, the work of constructing or making general repairs upon the railroad being in no proper sense incidental to, or an integral part of, the hauling of the logs. *Ibid.*

Of judgments. See DEEDS. FRAUDULENT CONVEYANCES, 10, 11.

LIFE INSURANCE. See INSURANCE, 3.

LIMITATION OF ACTIONS.

See PLEADING, 1.

If when a cause of action accrues in favor of a resident of this state against a nonresident thereof, the latter be out of the state, the statute of limitations upon the enforcement of such cause of action here will not run against the former while the latter remains so absent. *Adkins v. Loucks,* 587

LIMITATION ON TAXATION. See TAXATION, 7, 8.

LIVE STOCK INSURANCE. See INSURANCE, 4–8.

LOGS AND TIMBER. See LIENS, 7, 8. MASTER AND SERVANT, 3–7. PARTNERSHIP, 1, 3.

MALFEASANCE of officer. See CORPORATIONS, 14.

MANDAMUS.

1. Where for more than thirty years controversy had existed as to the existence of a highway, and it had been customarily obstructed for upwards of twenty years, and the owner of the soil had in good faith insisted that the alleged highway had no legal existence, because the necessary proceedings to open it had not been taken, and such claim had been submitted to by the town officers for more than twenty years, and they had refused to remove obstructions thereto because of doubt as to whether the possession of the occupants could be successfully contested, *mandamus* will not lie to compel the town board to remove such alleged obstructions. *State ex rel. Schermerhorn v. McCann,* 348

2. Sec. 1223, Stats. 1898, imposing upon town supervisors the duty of causing the highways in their towns to be kept free from obstructions to their use for public travel, requires summary action in reference to recognized highways only, and does not require them to decide *bona fide* disputes as to their existence. *Ibid.*

3. Where the existence of a highway is fairly in controversy, that controversy must be determined by the courts and so determined as to bind the parties affected, before the supervisors are in duty bound to proceed summarily to remove obstructions under sec. 1223, Stats. 1898. *Ibid.*

4. Where an alternative writ of *mandamus* ordered the state board of dental examiners to issue to relator a license to practice dentistry, or show cause, and a demurrer was interposed to that portion of the return which set out resolutions adopted concerning qualifications required by applicants for a license and establishing a standard for colleges whose diplomas would be recognized, and to another portion setting out evidentiary matters as to inquiries by the board regarding the standard of the college of which relator was graduated, the demurrer was *held* to be improperly interposed and sustained, since the portions demurred to were not set up as separate and distinct grounds why the defendants refused obedience to the writ, but are parts of one complete return, which, with the other matters set out, constituted the defense in the action. *State ex rel. Rice v. Chittenden,* 354

MARRIAGE AND DIVORCE. See DIVORCE.

MARRIED WOMEN.

See DEBTOR AND CREDITOR.

Since a married woman has not capacity to bind herself at law by contract, except as regards her separate property and business, in the absence of a showing that she received any consideration or benefit, directly or indirectly, or that the payee changed his situation to his prejudice on the faith of it, no recovery can be had in an action at law on a note given by a married woman solely for the purpose of securing or paying the debt of her husband. *Hollister v. Bell,* 198

MASTER AND SERVANT.

See DAMAGES, 3.

Injuries to servants: Negligence.

1. While a sixteen year old boy, at the close of his first day's work in defendant's paper mill, was putting on his coat preparatory to quitting work, in an open space a few feet wide between unguarded gearing on a paper machine and closets in which clothing of employees was kept, he backed up against the gearing and the garment was drawn into it, and he was injured. In an action to recover therefor, on the evidence, it was *held* that he assumed the risk as matter of law, even though he had not been warned concerning the danger. WINSLOW and DODGE, JJ., dissent. *Helmke v. Thilmany,* 216

2. In such a case the relation of master and servant continued to exist, although at the time of the injury plaintiff was changing his clothes preparatory to going home. *Ibid.*

3. In an action for personal injuries sustained by an employee in defendant's sawmill while at work on the log deck, where the only negligence on defendant's part, put in issue by the pleadings, was failure to furnish a reasonably safe place to work and failure to instruct and warn plaintiff as to the risks and dangers of the employment, the court submitted to the jury, as part of a special verdict, the question, "Was the defendant guilty of negligence in *allowing* plaintiff to work upon its log deck?" and in connection therewith instructed them, among other things, that said question embraced most of the principal questions in the case, including the questions whether defendant's log deck was a reasonably safe one, and whether defendant was ignorant of the work to which he was put and should have been instructed by defendant; and that in answering it they should determine whether such log deck was a reasonably safe place in which to work, whether it was of a kind in common use, what knowledge plaintiff had about that sort of work, and whether he had exercised ordinary care and prudence in handling the logs. *Held,* that said question, which in itself did not cover any issuable fact, was made by the instructions to cover almost every issue that could have been covered by a general verdict; and that its submission defeated the very object of a special verdict. *Sladky v. Marinette Lumber Co.* 250

4. Where the court sets aside, because against the uncontradicted evidence, the jury's finding to a question in the special verdict in such case, in substance, that log docks with substantially the same appliances as defendant's were not in common use, it should also have set aside the answer to other questions which, under the instructions of the court, the jury were at liberty to answer as they did on the sole theory that such appliances were not in common use. *Ibid.*

5. Failure to instruct or warn an employee as to the risks and hazards attending the employment is not negligence, unless the employer knew, or ought to have known, that such warning and instruction was necessary. *Ibid.*

6. In an action for personal injuries received by an employee on a log deck in a saw mill, it is *held*, as a matter of law, that plaintiff assumed the risks of his employment. *Ibid.*

7. In an action by a sawmill employee for personal injuries it appeared, among other things, that it was the proper, usual, and safe way to roll the logs down to where they were to be loaded onto the saw carriage when the carriage was back from the saw and in front of the skids on the log deck. *Held*, that plaintiff, having voluntarily chosen to roll the log down on the skids when the saw carriage was away, was guilty of contributory negligence. *Ibid.*

8. In an action to recover for personal injuries sustained by a sixteen-year-old boy while in the defendant's employ, it appeared, among other things, that at defendant's plant a side track, separating two of its buildings, was crossed by a steam pipe which connected such buildings; that such steam pipe was three feet and ten inches above the top of an ordinary freight car, and two feet and nine inches above the top of the car in question, and that plaintiff, who was assisting defendant's engineer to switch a car to a point beyond the steam pipe, had climbed to the top of the car to set the brakes, when he was struck in the back by the steam pipe, knocked from the top of the car, and injured. *Held*, that it was not error to admit, against objection, evidence tending to prove that the steam pipe in question might, at small cost and without injury to its efficiency, have been raised so as not to interfere with employees riding on top of freight cars. *Renne v. United States Leather Co.* 305

9. Where the evidence in such case was sufficient to support a finding of the jury to the effect that, by placing the steam pipe so near the top of such cars, the defendant made it unnecessarily hazardous for its employees riding on the tops of such cars, it was not error to submit to the jury, in the general charge, the questions whether the defendant was in the exercise of ordinary care in locating its steam pipe where it did, and, if negligent in that regard, whether such negligence was the proximate cause of the injury. *Ibid.*

10. Plaintiff had worked as an errand boy for defendant about six months before the injury complained of, and had helped defendant's engineer do the braking on cars switched to its buildings, but had never worked around machinery of any kind. He had passed under said pipe, on box cars, eight or ten times before, but never on the top of the cars, and had passed under the pipe on the track in question only two or three times. His back was towards the pipe, and he did not think of it, though he knew it was there. He did not know how high above the ground or the cars the pipe was, or that the car on which he was riding was higher than an ordinary car, and had never been cautioned about the pipe, or the care to be used in going under it. *Held*, that the questions whether the plaintiff appreciated, or ought to have appreciated, the precise danger of riding upon the top of the car while passing under the pipe, and whether the plaintiff was guilty of contributory negligence, were for the jury. *Ibid.*

11. In such case it was not error to charge the jury, that "you should not only consider that he knew the pipe was there, and that if he collided with it he would be injured, but you should inquire

whether he appreciated, or ought to have appreciated, the *precise danger* — the relation of the pipe to the track, to the box car, and its distance from the box car, and the danger of passing under on such a car,"— the effect of the words "precise danger" being to call the attention of the jury to the particular danger of the plaintiff being knocked off the car by the pipe, as distinguished from dangers generally by reason of working in defendant's yards. *Ibid.*

12. Nor was it error to instruct, in substance, that if the jury should find that the nearness of the pipe to the car was a danger to which plaintiff was exposed in the performance of his duty, and was a danger which was known and comprehended by him, or was so open or obvious that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable care, to have known it, then he assumed the risk. *Ibid.*

13. In such a case there was evidence showing that plaintiff had received general instructions about switching and coupling cars, and defendant's engineer testified that he had warned him to keep off from the tops of cars while in motion, which testimony was flatly contradicted by plaintiff. *Held*, that a finding that plaintiff had not been warned to keep off the tops of cars while passing under the pipe in question was supported by the evidence. *Ibid.*

14. MARSHALL and BARDEEN, JJ., dissenting, are of the opinion that the evidence showed that the danger which menaced the plaintiff was so open and obvious, and so well known to him, that it should be said, as a matter of law, that he assumed the risk of accident. *Ibid.*

MAXIMS.
Absoluta sententia expositore non eget, 431.
In custodia legis, 27.
Ita lex scripta est, 63.
Stare decisis, et non quieta movere, 632.

MEASURE OF DAMAGES. See DAMAGES. SALE OF CHATTELS, 1. TROVER AND CONVERSION, 2.

MECHANICS' LIENS. See CONTRACTS, 2. LIENS, 1-6.

MINORS. See GUARDIAN AND WARD. GUARDIAN AD LITEM. INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 1, 9-14. PARENT AND CHILD.

MISFEASANCE of officer. See CORPORATIONS, 15.

MISTAKE. See MORTGAGES, 1, 7. PAYMENT.

MITIGATION OF DAMAGES. See TROVER AND CONVERSION.

MORTGAGES.

See ACTION, 2. BUILDING AND LOAN ASSOCIATIONS. INSURANCE, 7, 8. VENDOR AND PURCHASER, 7.

1. Where a deed expressly provides that the grantees assume and agree to pay off a mortgage on the property conveyed, or expressly excepts a mortgage thereon from the covenant against incumbrances, parol evidence is inadmissible, in the absence of fraud or mistake, to show that at the time of the conveyance the grantor agreed to take care of such incumbrances. *Desmond v. McNamara*, 126

2. The acceptance of the deed in such case was, in effect, an express promise on the part of the grantees, in respect to such incumbrances, to all intents and purposes the same as if signed by them. *Ibid.*

8. Where property is purchased subject to a mortgage, the execution of a new mortgage by the purchaser when the old one matures is merely a recognition and affirmation of his previous agreement. *Ibid.*

4. In an action by the grantee of a mortgagor to compel satisfaction of a mortgage, the evidence—stated in the opinion—is *held* insufficient to show that the person through whom the loan was obtained had authority to receive payment thereof. *Kohl v. Beach*, 400

5. A mortgage was negotiated in the office of R., who carried on a loaning business, and thereafter all payments were made at his office. The owner of the mortgage denied that R. was her agent, and that he was authorized to receive payments of either principal or interest, and none of the receipts given by R. were signed by him as agent. The mortgagor, when he made payments, supposed R. was the owner of the mortgage. At no time when payments were made did R. have possession of the securities. There was no evidence that plaintiff held R. out as her agent, or that he professed to be such, and the mortgagor was not misled or deceived by appearances, or induced to make any payment to R. because of any act of plaintiff. The greater part of the money so paid to R. failed to reach the plaintiff. In an action to foreclose the mortgage, it is *held* that the evidence—showing the above facts, among others—failed to establish that R. was plaintiff's agent. *Spence v. Pieper*, 453

6. When the mortgagor, in such case, made payments to R. without having the papers produced or indorsements made in his presence, he was guilty of laches, and is not entitled to have the payments applied on the mortgage. *Ibid.*

7. Whatever form a conveyance of real estate, absolute on its face but given as a mortgage, may take, its true character may be shown by evidence *aliunde*, including parol evidence, whether the question be raised in a direct action for equitable relief or be incidental to relief demanded in an action at law: it is not essential that the mortgage feature should have been omitted by fraud or mistake. *Jordan v. Estate of Warner*, 539

8. A mortgage is a contract whereby an interest in property is pledged as security, and if in its execution a paper is made evidencing a part of it, and other papers be made at the same time evidencing other parts, all may be resorted to, and all must be construed together, if necessary, in order to determine the real nature of the transaction. *Ibid.*

9. In such case if any of the papers satisfy the statute of frauds (sec. 2302, Stats. 1898) as to the necessity of the estate or interest in lands created *inter partes* being created in writing, the other essentials may be shown, if not evidenced by such writings, either by other writings which form a part of the same transaction, or by parol evidence. *Ibid.*

10. Plaintiffs executed an absolute conveyance of lands to one since deceased, who at the same time executed and delivered to them a writing, referring to the conveyance, wherein decedent recited that he held claims against such lands, and other land of plaintiffs, for taxes and tax deeds, and that he thereby appointed plaintiffs his agents to sell the lands and account to him for the proceeds. The writing also provided that if, at any time within five years, those proceeds should be sufficient to satisfy a specified amount, with interest, and all other specified claims, plaintiffs

would be entitled to a reconveyance of the remaining lands. *Held*, that the relation of mortgagor and mortgagee was created by such writings. *Ibid.*

11. In an action to recover damages for the wrongful sale of such lands, it appeared that decedent had obtained tax titles, based on tax certificates which came to his possession while he was the mortgagee of plaintiffs in respect to the lands covered by the tax deeds. *Held*, that such tax deeds were invalid, and that decedent's estate was properly charged with the amount received by him on the sale of such lands. *Ibid.*

12. Decedent having secretly, and in violation of his agreements, sold the mortgaged property, no injustice is done his estate by crediting the plaintiffs with the sale price of the lands, and charging them with all sums decedent paid out for tax claims thereon and all other legitimate expenditures; but no credit should have been allowed the estate for services of the decedent in making the sales. *Ibid.*

MULTIFARIOUSNESS. See ACTION, 2, 3, 5.

MUNICIPAL CORPORATIONS.

See ACTION, 6. POOR LAWS.

Incorporation. See VILLAGES.

Adoption of general charter provisions: Ordinances: Validity.

1. Under sec. 926, Stats. 1898, any city, incorporated under a special charter, is authorized to adopt, by ordinance, the provisions of any chapter, subchapter, section, or subdivision of a section of the general city charter law (ch. 40*a*, Stats. 1898), as an addition to or in lieu of provisions of its charter. Subch. XVIII of ch. 40*a* (secs. 925–172 to 925–200), entitled "City Improvements," relates, among other things, to the establishing and recording of grades for streets; the proceedings to be taken for their improvement, including the raising of the necessary funds therefor; and the assessment of benefits and damages to the abutting lot owner upon the alteration of an established grade, or the doing of any work on the streets at the expense of the real estate benefited, with right of appeal to the circuit court. The common council of La Crosse, a city incorporated under a special charter, by ordinance, adopted sec. 925–175 and secs. 925–177 to 925–197, leaving out the other sections of subch. XVIII. Sec. 925–173, one of the omitted sections, requires the establishment and recording of the grade of *all* streets, and prohibits work thereon until such grade is established and recorded, and its provisions do not appear, either in form or substance, in any part of the special charter of La Crosse. *Held*, that the omission of sec. 925–173 was a substantial and material change in the law as passed by the legislature, and therefore fatal to the validity of the ordinance. *State ex rel. Boycott v. Mayor, etc., of La Crosse,* 654

Ordinances: Franchises: Street railways. See CONSTITUTIONAL LAW. STREET RAILWAYS, 8.

2. By sec. 1862, Stats. 1898, the city is empowered to grant the use of streets and bridges to street-railway corporations *upon such terms as the proper authorities shall determine.* A city, acting under such statute, granted the defendant street-railway company a franchise to extend its lines, then in operation, on certain designated streets, without receiving any money consideration therefor, but in consideration that the company should charge a reduced fare. The

company had formerly offered a large sum of money for such franchise, with the right to charge the former fare; and other parties had offered a large sum of money for the additional franchise, but they owned no connecting lines. *Held*, that the granting of the franchise was a question addressed to the sound discretion of the common council; and that when it decided that the reduced fares were more desirable for the public, while it may or may not have exercised good discretion, such action cannot be called, in any proper or reasonable sense, a squandering of public funds or property. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493

3. Under sec. 1862, Stats. 1898, giving the municipality power to grant to street railway companies the use of streets, without limitation, save that such grant be made "upon such terms as the proper authorities shall determine," the common council thereof has power to extend existing franchises of such corporations, which would expire in 1924 and succeeding years, to 1934, and such extension of time is not unreasonable. *Ibid.*

4. Objection to the regularity of the proceedings of the common council in adopting an ordinance granting to a street-railway corporation the streets of the city, in that the provisions of sec. 940*b*, Stats. 1898, requiring publication of the application therefor in the official paper for not less than two weeks, reference to appropriate committees, and report therefrom before action, were not complied with; and objection to such ordinance in that its officers used corrupt methods in securing passage of such ordinance by agreeing to pay large sums to citizens in order to induce them to cease opposition to its passage,—it not being charged that any member of the council was corrupted,—cannot be raised at the suit of private parties. *Ibid.*

Franchises: Waterworks. See CORPORATIONS, 3.

Streets: Injuries from defects. See DAMAGES, 1, 6, 7. EVIDENCE, 4. HIGHWAYS, 6, 9–15. INSTRUCTIONS TO JURY, 2. PARTIES, 1.

5. In the absence of structural defects which combine with the action of the elements in causing accumulations of ice and snow on a sidewalk, the condition of a sidewalk crossing an alley, which has become uneven by falling snow and the melting and freezing of the same while used by persons and teams, does not constitute an actionable defect. *Draper v. Milwaukee,* 88

6. Recovery cannot be had against a city for personal injuries happening through a fall on an icy sidewalk, where the plaintiff's evidence leaves the cause of the fall open to mere conjecture. *Ibid.*

7. Under sec. 1339, Stats. 1898, a special verdict, finding in the disjunctive that a street was "in a defective or dangerous condition *or* out of repair," without any other fact to support it, fails to show actionable negligence and is fatally defective; and the fact that the finding is in the words of sec. 20, subch. VIII, of the city charter (ch. 123, Laws of 1891), which does not assume to impose any liability on the city but merely relates to notice, does not render it sufficient. *Rhyner v. Menasha,* 201

8. A hole in the street, close to the sidewalk, was two feet long and fifteen inches wide, in the shape of a half moon, and had apparently been caused by the washing of surface water escaping from the street. Its dimensions and the duration of its existence were sharply in dispute. *Held*, that it was not, as matter of law, such a defect as would make the city absolutely liable for a personal injury caused thereby. *Ibid.*

9. In such case it is error not to submit, as part of the special verdict, a question as to whether the city authorities ought, under all the circumstances, reasonably to have anticipated that an accident might happen and injury be sustained by travelers in the street,—the court's attention having been directed to the matter by a request for the submission of an objectionable question embodying the idea. *Ibid.*

10. In an action for personal injuries from a defective street, an instruction that "Negligence means this: It means a want or lack of ordinary care and prudence. Ordinary care and prudence is such care and prudence as is exercised by the mass of mankind in their own daily affairs," without qualification or limiting it to the same or similar circumstances to those in issue, is error; and such error is not cured by afterwards correctly instructing the jury that ordinary care and prudence means such care and prudence as persons of ordinary care and prudence exercise under similar circumstances. *Ibid.*

11. Where, in an action for personal injuries from a defective street, the issue of plaintiff's intoxication is submitted to the jury, the defendant is entitled to an instruction that, if plaintiff was intoxicated, such intoxication is evidence from which the jury may infer that plaintiff was guilty of contributory negligence, the instruction being requested in conjunction with another connecting such intoxication with the accident. *Ibid.*

12. Where, in an action against a city for an injury from a defective street, the evidence shows that the plaintiff was very much intoxicated at the time of the accident, it is a question for the jury, under proper instructions, whether, under all the facts and circumstances in the case, such intoxication contributed to produce the injury. *Ibid.*

13. Where, in an action against a city for an injury caused by a defective street, a witness testifies that he passed the place of accident while plaintiff was lying there, but that it was too dark to recognize who was there, it is error to afterwards recall the witness and permit him to testify, over objection, that he saw no indications that the man lying there was drunk. *Ibid.*

14. Under ch. 85, Laws of 1893, in the absence of any showing that the defendant was misled in fact, or of an intention to mislead on the part of plaintiff, a notice is sufficiently particular that describes the defect as consisting of missing boards or planks from the sidewalk or footway on the easterly side of C. street, in front of premises No. 203, owned by C., even though such premises were sixty feet in width. *Collins v. Janesville,* 436

15. Where plaintiff in such case admitted she knew of the defect in the sidewalk into which she claims she fell, an instruction that a person passing over a sidewalk known to be in a defective and dangerous condition must use greater care and caution than if she were ignorant thereof, should have been given upon request or its substance incorporated in the general charge. *Ibid.*

16. An instruction in the same connection that a traveler may indulge in a presumption that the street on which he travels is not defective, while it may be correct in the abstract, is misleading, because not applicable to one who knows of the existence of the defect in question. *Ibid.*

MUNICIPAL COURTS. See COURTS.

MUTUALITY. See CONTRACTS, 3. LANDLORD AND TENANT, 9.

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 3.

NEGATIVE PREGNANT. See HIGHWAYS, 9.

NEGLIGENCE. See DAMAGES, 1, 3, 6, 7. EVIDENCE, 4. HIGHWAYS, 9–15. INSTRUCTIONS TO JURY, 6–8. LANDLORD AND TENANT, 4, 5. MASTER AND SERVANT. MORTGAGES, 4, 6. MUNICIPAL CORPORATIONS, 5–16. RAILROADS, 6–8. VOLUNTARY ASSIGNMENT, 2–5.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. GUARANTY, 3, 4. MARRIED WOMEN. VOLUNTARY ASSIGNMENT, 10.

NEW TRIAL. See APPEAL, 9, 19, 20. DAMAGES, 5.

NOMINAL DAMAGES. See TROVER AND CONVERSION, 3.

NONFEASANCE of officer. See CORPORATIONS, 14, 15.

NONRESIDENTS. See LIMITATION OF ACTIONS.

NOTICE.
Of defects in streets and highways. See HIGHWAYS, 12, 13. INSTRUCTIONS TO JURY, 2. MUNICIPAL CORPORATIONS, 7, 14.
Of loss under insurance policy. See INSURANCE, 4–6.
To quit. See LANDLORD AND TENANT, 7.

NUISANCES.

See PARTIES, 1.

1. In an action to restrain an alleged nuisance, a complaint — alleging, in substance, that plaintiff is possessed of an attractive house surrounded by lawns; that defendant, owning the adjoining lot, built a fence four feet from plaintiff's house, but entirely on defendant's land, consisting of rough tamarack posts, from eight to sixteen feet high, and old, unsightly, and partially decayed lumber of varying lengths, which fence extended back about ninety feet from the street, and was supported by wires strung from the tops of the posts to defendant's house; that the fence shut off the view from the house to the street, injured the value of the property for rent or sale, and was wilfully and maliciously erected — fails to state a cause of action. *Metzger v. Hochrein*, 267
2. In the absence of physical injury to adjoining property or its occupants, one may use his own land or erect on it any structure he may see fit, regardless of the unreasonableness or maliciousness of his motives, even if by so doing the adjoining property is rendered less valuable and desirable by diminished beauty of surroundings, access of light, and opportunity to see it from the surrounding territory or to freely view such territory therefrom. *Ibid.*

OFFICERS. See ATTACHMENT, 1. CORPORATIONS, 14, 15.

OFFICIAL BONDS. See VOLUNTARY ASSIGNMENT, 2–5.

OFFSET. See JUDGMENTS, 2–6. VOLUNTARY ASSIGNMENT, 10.

OPINION EVIDENCE. See VOLUNTARY ASSIGNMENT, 4.

OPTIONS. See LANDLORD AND TENANT, 9. VENDOR AND PURCHASER, 1, 2.

ORDERS.
Appealable. See APPEAL, 11.
Intermediate. See APPEAL, 3.
Town. See INTEREST, 6. TAXATION, 8.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1–4. STREET RAILWAYS, 8.

PARENT AND CHILD.

See ACTION, 8. SETTLEMENT.

A father of girls aged seven and nine years, respectively, is unsuitable to have their care and custody, where it appears that he is mentally weak, to an extent rendering him incapable of doing business intelligently; that he is very excitable and is accustomed to apply bad names to his children and drive them from his presence by profanity and abuse; and that in consequence thereof they are becoming unmanageable. *Lemmin v. Lorfeld,* 264

PAROL EVIDENCE. See MORTGAGES, 1, 7, 9. SETTLEMENT, 2. VENDOR AND PURCHASER, 10.

PARTIES.

See ACTION, 4, 7. EJECTMENT.

1. Under sec. 2604, Stats. 1898, authorizing one to sue for the benefit of all where the question is one "of common or general interest of many persons," two or more owners in severalty of abutting lots similarly situated *may* join as plaintiffs, in an action to prevent the laying of a street railway, about to be laid upon a street without authority of law, on the ground that it will be a continuing nuisance to the owners of abutting lots, but one cannot sue for the benefit of all; and a statement in the complaint that he does so sue is mere surplusage. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493

2. If a person convey property in fraud of others who are entitled to resort to it for the collection of their claims, and the vendee retain part of the consideration and part of it be paid to and retained by a third person as trustee for the vendor, and both be guilty participants in the fraud, all are proper parties defendant in an action to enforce the right of such person to a satisfaction of his debt out of the property conveyed. *Adkins v. Loucks,* 587

PARTITION.

In an action for partition the only controversy was as to the existence of an executory contract whereby the plaintiffs, through their agent, agreed to convey the lands in question to the defendants, under which contract defendants claimed to have gone into possession. *Held,* that the possession and claim of title by defendants were not hostile and adverse, but in subordination to plaintiffs' title, and such as could only be enforced in equity; and that the issues as to title, being equitable in their nature, might properly be disposed of in the partition action. *Morgan v. Mueller,* 241

PARTNERSHIP.

See ACTION, 1, 9. APPEAL, 12. INTEREST, 3. LIENS, 5.

1. The agreement of the parties was that plaintiff should investigate and locate desirable timber lands; that, on defendants' approval, defendant P. should advance the necessary money to purchase the lands, he to be repaid with interest; and that, on purchase, they would either sell or log them, the profits or losses to be shared equally between the parties. *Held,* that this constituted a partnership, since all shared in the conduct and risks of the business and

the ultimate division was to be of the profits as such. *Smith v. Putnam,* 155

2. A parol contract of partnership for dealing in lands is within the statute of frauds so long as it is still executory; but where, under a partnership agreement, plaintiff explored and found land and standing timber, and after defendants had bought it, the timber was logged, the land sold, and a division of the proceeds made, incomplete only because erroneous in amount, the contract was fully executed, and hence was not within the statute. *Ibid.*

3. Plaintiff and defendants entered into an agreement to purchase and log lands, each to receive one fourth of the net profits, each enterprise to be separate and the profits divided and paid as soon as closed. Three enterprises were taken up and two completed, for which plaintiff received an incorrect sum, as representing his share in one, and a statement of the profits in the other was rendered. The third enterprise was uncompleted and unsettled when he sued at law to recover the sum due him on all three enterprises. *Held,* that the parties had, by agreement, so severed their different transactions that plaintiff's share of the profits in the first two could be properly ascertained without involving the incomplete third enterprise; and that, defendants having by their conduct on the trial waived their right to insist that the relief should be had in a suit in equity, a money judgment was properly rendered for the amount ascertained to be due plaintiff in the first two enterprises. *Ibid.*

PASSENGERS. See RAILROADS, 7.

PAUPERS. See POOR LAWS.

PAYMENT.

See EVIDENCE, 2. SETTLEMENT.

In the absence of fraud or mistake a payment cannot be shown to relate to a subject matter different from that stated in the receipt given therefor. *Kammermeyer v. Hilz,* 101

PERSONAL INJURIES. See DAMAGES, 1, 3, 6, 7. HIGHWAYS, 9–15. INSTRUCTIONS TO JURY, 2, 6–8. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 5–16. RAILROADS, 6–8.

PLATS. See HIGHWAYS, 6–8.

PLEADING.

See ACTION, 1–3, 5, 9. CORPORATIONS, 1, 3, 14. COSTS, 7. GUARDIAN AD LITEM. HIGHWAYS, 9. INTEREST, 5. LIBEL AND SLANDER, 3, 4. MANDAMUS, 4. NUISANCE, 1. PARTIES, 1. RAILROADS, 4, 5. VOLUNTARY ASSIGNMENT, 5, 6. WATERS, 2.

1. Under sec. 2830, Stats. 1898 it is an abuse of discretion to allow the statute of limitations to be set up, by an amendment upon the trial, without any showing to excuse the delay, and without the imposition of any terms or conditions. Such a ruling is not "in furtherance of justice." *Sullivan v. Collins,* 291

2. An answer in an action for forcible entry and detainer, which alleged a promise and failure to repair, whereby defendant's ice was destroyed and the premises rendered of no value, with no *ad damnum* clause, and no facts pleaded expressly as a counterclaim, or so denominated, is demurrable as a counterclaim. *Brauchle v. Nothhelfer,* 457

3. Failure to allege that a plaintiff or defendant is a corporation, and where incorporated, as required by sec. 3205, Stats. 1898, renders a complaint insufficient, and the defect may be reached by a general demurrer. *Carpenter v. McCord Lumber Co.* 611

4. That a defendant sued as the McCord Lumber Company is intended to be sued as a corporation sufficiently appears from its name. *Ibid.*

PLEA IN ABATEMENT. See VOLUNTARY ASSIGNMENT, 5.

PLEDGES.

See VOLUNTARY ASSIGNMENT, 7.

1. An assignment and transfer of stock in a corporation to an attorney as trustee for a creditor of the transferrer, with the understanding and agreement that any surplus remaining in the hands of the trustee after payment of the creditor's claims should be immediately returned to the transferrer by the trustee, is merely a transfer as collateral security by way of pledge, the surplus, if any, remaining the property of the pledgor. *Haring v. Hamilton,* 112

2. The pledgee of practically all the stock in a corporation is not liable for depreciation in the value of the corporate property due to the giving of a mortgage on the corporate property, by its officers, in violation of an injunction against the corporation. *Ibid.*

POOR LAWS.

See COUNTIES.

1. Under sec. 1512, Stats. 1898 (providing for the temporary relief by towns, cities, and villages of poor persons not having a legal settlement therein, and making the expenses so incurred a charge against the county, provided notice is given as therein specified), the town, city, or village is primarily liable for the relief, and the county is liable to reimburse it upon its complying with the conditions precedent named in the section. *Ebert v. Langlade Co.* 569

2. L., a poor person without means of procuring medical treatment, and having no legal settlement in the defendant county, became suddenly in need of treatment while residing in one of its towns. The chairman of said town gave the prescribed notice, brought L. to the county seat, and employed a physician to render medical treatment to L., under an agreement that the physician should file his claim therefor with the county clerk, to be paid by the county. The amount charged for the services was reasonable and the claim was audited by the county board. Thereupon plaintiff brought an action as a taxpayer, suing in behalf of himself and all other persons similarly situated, to enjoin the issuing of a county order on such audited claim. *Held,* that the claimant had no legal or equitable demand enforceable against the county. The claim should have been presented to and audited by the auditing board of the town and paid out of the town treasury like any other town liability, and a claim should then have been presented by the town to the county for reimbursement. *Ibid.*

3. Although the county, in such case, was not legally liable for the claim, yet, as it was reasonable in amount, and, if it had taken its proper course, would ultimately have reached the county as a legal claim and would have been paid at precisely the amount allowed, a court of equity will not interfere at the suit of a taxpayer. *Ibid.*

POSSESSION. See FRAUDULENT CONVEYANCES, 3–5. TRESPASS, 1. VENDOR AND PURCHASER, 3–5.

PRACTICE.

See APPEAL. CORPORATIONS, 8, 10–12. COSTS. EJECTMENT, 3, 4. EVIDENCE. EXECUTORS AND ADMINISTRATORS. FRAUD, 1. FRAUDULENT CONVEYANCES, 11. GUARDIAN AD LITEM. GARNISHMENT, 1. INJUNCTION, 1. INSTRUCTIONS TO JURY. JUDGMENTS. MARRIED WOMEN. PLEADING. PARTNERSHIP, 3. PARTIES. TROVER AND CONVERSION, 3.

In an action brought and tried as an action at law, such relief only is obtainable as the facts warrant in that form of action. *Hollister v. Bell,* 198

PREFERENCES. See FRAUDULENT CONVEYANCES, 1.

PRESUMPTIONS. See FRAUDULENT CONVEYANCES, 5.

PRINCIPAL AND AGENT. See BROKERS. MORTGAGES, 4, 5.

PRINCIPAL AND SURETY. See GUARANTY. SURETYSHIP. VENDOR AND PURCHASER, 1.

PROMISSORY NOTES. See BILLS AND NOTES. GUARANTY, 3, 4. MARRIED WOMEN. VOLUNTARY ASSIGNMENT, 10.

PROVISIONAL REMEDIES. See ATTACHMENT. GARNISHMENT. INJUNCTION.

PROXIMATE CAUSE. See INSTRUCTIONS TO JURY, 7, 8. MASTER AND SERVANT, 9.

QUO WARRANTO. See CORPORATIONS, 8, 10. VILLAGES.

RAILROADS.

Logging railways. See LIENS, 8.

Street railways. See STREET RAILWAYS.

Organization: Defective incorporation.

1. Sec. 1820, S. & B. Ann. Stats., does not authorize the formation of a railroad corporation for the purpose of carrying persons only, the intention being, in view of the other statutory provisions relating to railroads, that corporations organized thereunder should be common carriers in the fullest sense of the term, and should carry either persons or property as the occasion might require. *Chicago & N. W. R. Co. v. Oshkosh, A. & B. W. R. Co.* 192

Condemnation of land.

2. There being no authority in sec. 1820, S. & B. Ann. Stats., for the formation of a railroad corporation for the carriage of passengers only, such a corporation could not exercise the power of eminent domain, conferred by sec. 1828 upon corporations organized under said sec. 1820, and could not, therefore, condemn a right of way across a railroad previously constructed. *Chicago & N. W. R. Co. v. Oshkosh, A. & B. W. R. Co.* 192

3. A railroad company constructed its roadbed so that a portion of the embankment extended onto the premises of plaintiff's intestate, and maintained the same for five years without objection. Meanwhile the intestate sold the premises, and accepted the price they brought in that condition, reserving his claim against the company. *Held,* that his right to obtain compensation for the injury to his premises under sec. 1852, Stats. 1898, had become irrevocable, and was not defeated by the act of the railroad company in removing all parts of its embankment from the limits of said premises. *Balcock v. C. & N. W. R. Co.* 280

4. In a proceeding by a landowner to recover compensation for land over which a railroad had constructed its road without having acquired title, the allegations of the petition are to be liberally construed, so far as is consistent with reasonably certainty of information. So construed, a petition, alleging the construction of defendant's track over an ascertainable parcel of land belonging to plaintiff, to which was annexed a plat specifying courses and distances with reference to duly defined and recorded lot lines, is sufficient to confer jurisdiction upon the court to ascertain and adjudge what land, within the limits of that described, had in fact been occupied by defendant's construction. *Ibid.*

5. Although sec. 1852, Stats. 1898, requires proceedings thereunder to comply generally with the provisions relating to condemnation of land by railroad corporations, a landowner, seeking under that section to recover compensation for land already taken, need not allege or prove the necessity of the taking, required by sec. 1846 in condemnation proceedings initiated by a railroad company. *Ibid.*

Negligence: Injuries to employees.

6. While a train was standing on a sidetrack within a few car lengths of another train headed in the opposite direction, the engine of which was engaged in switching, the engineer, without setting the brakes or giving any signal or warning of any kind either to his own crew or to the crew of the other train, crawled under his engine for the purpose of making repairs and remained there a considerable length of time, until the rear end of his train was struck by the other train and his engine impelled forward several feet, fatally injuring him. Before going under the engine the engineer knew that his fireman was at work in such a position that it would be practically impossible for him to see any movement of the other train or signal to its crew. *Held*, that the deceased was guilty of contributory negligence precluding a recovery by his personal representative. *Hulien v. C. & N. W. R. Co.* 122

Negligence: Injuries to passengers.

7. In an action for personal injuries received in a railway collision, a physician who examined the plaintiff about six months after the injury, with a view to testifying on the trial, testified that he then discovered a displacement of the semilunar cartilage of the left knee and replaced it, but did not disclose the fact to the family physician although the latter was present at part of the examination. No symptoms of any such displacement were discovered, either by the same physician upon both prior and subsequent examinations, or by plaintiff's family physician who examined her repeatedly and attended her to the time of the trial, and no reference thereto was made in the complaint unless under a general allegation that plaintiff was "otherwise injured." It was admitted that a person could not walk or stand upon a limb during such a displacement, and that plaintiff walked without assistance immediately after the accident and from time to time thereafter. *Held*, that a finding of the special verdict that said cartilage was displaced by the collision was unsupported by the evidence, especially in view of the testimony of all the other medical experts that upon the admitted facts there could have been no displacement by the accident. *Smith v. C. & N. W. R. Co.* 85

Negligence: Injuries to persons on track.

8. In an action to recover for personal injuries, it appeared, among other things, that plaintiff, a boy nine years old, went onto de-

fendant's drawbridge, 228 feet long, at the request of the bridge tender, and, as the bridge was being closed, stood at one end of the draw to signal the tender when to stop. The bridge was operated by means of a sweep or lever, connected with the gearing below, the bridge tender taking hold of the end and traveling in a circle while closing the bridge. Plaintiff, whose foot was crushed by being caught between the ends of the rail on the bridge and the shore rail, testified that he stood facing the end of the bridge with his foot on the rail. There was no evidence that the place where he stood was dangerous, or that the bridge tender could have seen his danger. *Held*, that there was no evidence to sustain a finding of defendant's negligence. *Hudson v. Northern Pacific R. Co.* 620

RATIFICATION. See ATTACHMENT, 1, 2.

REAL-ESTATE AGENTS. See BROKERS.

REAL PROPERTY. See ACTION, 2. BROKERS. GUARDIAN AND WARD. HIGHWAYS. LANDLORD AND TENANT. MORTGAGES. NUISANCES. PARTNERSHIP. PARTITION. RAILROADS. STREET RAILWAYS. TRESPASS. VENDOR AND PURCHASER. WILLS, 3.

RECEIPTS. See PAYMENT. SETTLEMENT, 2.

RECORDING ACTS. See BUILDING AND LOAN ASSOCIATIONS, 5.

REFERENCE.

See APPEAL, 8, 15.

Under sec. 2864. Stats. 1898, a compulsory reference was proper, where, on appeal from the allowance by the county court of a claim against a decedent's estate, the trial in the circuit court involved matters of account as to numerous tracts of land, against which decedent had purchased tax certificates under an agreement with claimant to release them on being reimbursed, the transactions of such accounts covering a long period of time, and consisting of numerous debit items of payments to protect the lands from tax claims, and numerous credit items of sums realized from sales, redemptions, rent, trespass, etc. *Jordan v. Estate of Warner*, 539

REMEDIES. See ATTACHMENT. BUILDING AND LOAN ASSOCIATIONS, 6. FRAUD, 2. FRAUDULENT CONVEYANCES, 10, 11.

RES ADJUDICATA. See APPEAL, 16–18. EJECTMENT, 1. FRAUD, 2. GUARANTY, 2. WILLS, 5.

ROADS AND STREETS. See CONSTITUTIONAL LAW. HIGHWAYS. INSTRUCTIONS TO JURY, 2. MANDAMUS, 1–3. MUNICIPAL CORPORATIONS, 5–16. STREET RAILWAYS.

RULES OF COURT.
Circuit Court Rule XXXIII (Taxation of costs), 63.
Supreme Court Rule XXXII (Mandate on reversal), 33.

SALE OF CHATTELS.

See CONTRACTS, 3, 4. FRAUDULENT CONVEYANCES, 2–8. INTEREST, 1.

1. In case of breach of warranty in the sale of chattels, if a comparatively small outlay will remedy the defect, the vendee is not entitled to keep the chattels and refuse to make the necessary change and recover back the entire purchase price, but he should make the change or cause it to be made, and the reasonable expense of making it will be the ordinary measure of his damages. *J. I. Case Plow Works v. Niles & Scott Co.* 9

2. In an action to recover damages for breach of warranties in the sale of cultivator wheels, evidence that the wheels could have been made entirely serviceable and suitable for the uses intended, at a maximum cost much less than the purchase price, by knocking out the old hubs and casting or welding in new hubs, is *held* to have been uncontroverted, notwithstanding one witness testified generally that the wheels were worthless as cultivator wheels; and another testified that, at the time of the trial more than eight years after the manufacture of the wheels, when they had greatly depreciated by rust, he considered them worthless; and the court found that they were "practically useless and of no market value." *Ibid.*

SCIRE FACIAS. See CORPORATIONS, 8.

SEDUCTION. See ACTION, 8. SETTLEMENT, 1.

SERVICE.
Of notice of injury. See HIGHWAYS, 13.
Of notice to quit. See LANDLORD AND TENANT, 8.

SETOFF. See JUDGMENTS, 2–6. VOLUNTARY ASSIGNMENT, 10.

SETTLEMENT.

See ACTION, 8. VENDOR AND PURCHASER, 6.

1. A father and daughter having settled, for a gross sum paid the father, all their claims against P. for the seduction of the daughter, and the father having by such settlement agreed with P. to support and maintain the child born to the daughter, the fact that the child died soon after does not increase the amount the daughter is entitled to: she is only entitled to such portion of the money paid, as, in the contemplation of the parties, was paid in satisfaction of *her* claim. *Kammermeyer v. Hilz*, 101

2. The memorandum of settlement with P. being in writing, admission of the testimony of P. to the effect that the money was paid over for the benefit of the daughter was error. *Ibid.*

SIDEWALKS. See MUNICIPAL CORPORATIONS, 5, 6, 14.

SPECIAL ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

SPECIAL VERDICT. See FRAUDULENT CONVEYANCES, 2, 7. INSTRUCTIONS TO JURY, 1. INSURANCE, 7. MASTER AND SERVANT, 3, 4. MUNICIPAL CORPORATIONS, 7, 9. RAILROADS, 7. VERDICT.

STATUTE OF FRAUDS. See GUARANTY, 3, 4. MORTGAGES, 9. PARTNERSHIP, 2. VENDOR AND PURCHASER, 3, 5, 8, 10, 11.

STATUTES OF LIMITATION. See LIMITATION OF ACTIONS. PLEADING, 1.

STATUTES.

Construction. See APPEAL, 1, 3. CONSTITUTIONAL LAW. CORPORATIONS, 5-10. COUNTIES. COURTS. ESTATES OF DECEDENTS, 1–3, 5. EXECUTORS AND ADMINISTRATORS, 2. FRAUDULENT CONVEYANCES, 3, 4, 9–11. GUARANTY, 3. HIGHWAYS, 1–3, 12–14. LIBEL AND SLANDER, 1–3. MANDAMUS, 2, 3. MUNICIPAL CORPORATIONS, 1–4, 7, 14. PARTIES, 1. PLEADING, 1, 3. POOR LAWS, 1. RAILROADS, 1–3, 5. TAXATION, 1–4, 7, 8. VOLUNTARY ASSIGNMENT, 9, 11.

Amendment and repeal. See COURTS. TAXATION, 1, 2, 4, 7.

Mandatory or directory? See HIGHWAYS, 2.

General city charter. See MUNICIPAL CORPORATIONS, 1.

Remedial. See TAXATION, 4.

STATUTES CITED, ETC.

CONSTITUTION OF WISCONSIN.

Art. I, sec. 13 - - 6
" IV, " 1 - - 664, 665
" IV, " 31 495, 513, 665, 666, 669
" IV, " 32 - - 664-666
" VII, " 8 - - - 447

SESSION LAWS.

1856. Ch. 120 - - - - 449
1856. " 120, secs. 334, 336 - 449
1885. " 222 - - - - 429
1885. " 270 - - - - 83
1891. " 123, subch. VIII, sec. 20 201, 202, 207, 211
1891. " 204 - - - - 230
1891. " 414 - - - - 117
1893. " 33 - - - 300, 301
1893. " 85 - - - 437, 439
1893. " 112 - - - 300, 301
1893. " 220 - - - - 125
1895. " 267, sec. 2 - 80, 82
1895. " 278 - - - 300, 302
1895. " 293 - - 599, 602, 604
1895. " 385 - - - 599, 604
1897. " 251 - - - - 197
1899. " 50 - 420, 421, 424, 427, 430
1899. " 325 - - - 600, 605

REVISED STATUTES OF 1878.

Section 1224 - - - - 476
" 3241 - - - - 445
" 3931 - - - - 71
" 3982 - - - - 71

S. & B. ANNOTATED STATUTES.

Section 776 - - 599, 602-604
" 823 - - - - 601
" 1240 - - 599, 602, 604
Sections 1693-1702c (ch. 80) 171, 174, 175, 177
Section 1702d - - - 172, 177
Sections 1702d-1702u (ch. 80a) 171, 174-178
" 1792-1864a (ch. 87) - 195, 197, 198
" 1798-1800 - - - 196
Section 1820 - 192, 193, 195-198
" 1828 - - - - 193
" 1828, subd. 7 - - 196
Sections 1862, 1863 - - - 197
Section 2447 - 404, 405, 407, 408
" 2579 - - - 405, 408
Sections 4282-4306 (ch. 179) - 175
Section 4971, subd. 12 - 171, 178
" 4972, subd. 2 - 171, 178

STATUTES OF 1898.

Sections 554-560 (ch. 23) - 666
Section 655 - - - - 666
" 665 - - - 80, 83
" 670, subd. 1 - - 83
" 686 - - - - 605
" 697a - - - 83
Sections 852-925h (ch. 40) - 666
" 925—1 to 925—269 (ch. 40a) - - 654
Section 925—3 - - - 667
Sections 925 — 14, 925 — 17. 925—18 - - 667
" 925—172 to 925—200 (subch. XVIII, ch. 40a) 654, 658, 959
Section 925—172 - - 658, 661
" 925—173 654, 658, 662, 670
" 925—174 - - 658, 660
" 925—175 - - - 654
" 925—176 - - 658, 662
Sections 925—177 to 925—197 654
" 925—178 *et seq.* - 662
" 925—199, 925—200 - 658
Section 926 - - - 654, 667
" 940b - - 495, 516-518
" 1012b - - - - 429
" 1055 - - - 421, 427
" 1059 420, 421, 424, 427, 428, 430, 433
" 1108 - - - - 666
" 1223 - - - 349, 353
Sections 1223-1347c (ch. 52) - 666
Section 1240 - - - - 599
" 1267 - - - - 1, 4
" 1269 - - - 380-382
" 1275 - - - 380-382
" 1276 - - - - 1, 4
" 1282 - - - - 9
" 1339 201, 207, 559, 560, 564-566
Sections 1348-1358 (ch. 53) - 666
Section 1512 - - 569, 571, 572
" 1532 - - - - 106
" 1636j - - - - 222
" 1692 - - - 541, 558
Sections 1693a, 1694 - - - 118
Section 1695 - - - 20, 30, 33
" 1751 - - - 117, 118
Sections 1771-1774 - - - 666
" 1771-1791m (ch. 86) - 666
" 1792-1864a (ch. 87) - 195
Section 1816 - - - - 125
" 1820 - - - 195-198
" 1828 - - - - 195
" 1846 - - - 280, 285
" 1852 - 280, 282, 283, 285

STATUTES CITED, ETC.—con.

STATUTES OF 1898—con.

Section 1862 493–495, 505, 511, 515, 518
" 1863a - - - 197, 512
Sections 1966—32, 1966—33 - 341
Section 1966—34 - - 337, 341
" 1977 - - - - 608
" 2204 - - - 273, 277
" 2302 - - - 540, 552
" 2304 - - - 535, 536
" 2307, subd. 2 - 574, 576
" 2308 - - - 578, 583
" 2310 - 578, 579, 582–584
" 2314 - - - - - 118
" 2320 120, 588, 595, 627, 630, 632, 638, 644, 645
" 2323 - - - - 120
" 2356 - - - - 188
" 2356, subd. 5 - 186, 188
" 2565 - - - - 335
" 2591a - - - - 230
" 2604 - - - 494, 507
" 2649 - - - - 33
" 2654 - - - - 167
" 2655 - - - - 563
" 2664 - - - 286, 289
Sections 2668, 2669 - - - 285
Section 2677 - - - 357, 362
" 2762 - - - - 60
" 2766 - - - 60, 62, 63
" 2768 - - - 286, 289
" 2772 - - - 60, 62, 63
" 2774 - - - 494, 510
" 2829 - - 285, 458, 461
" 2830 - - 285, 291, 293
" 2858 - - - 250, 257
" 2864 - - - 539, 550
" 2883 - - - 587, 593
" 2902 - - - 627, 629
" 2921 - - - 60, 62
" 2942 - - - - 653
" 2978 - - - 628, 629
" 2988 - - - 112, 118

STATUTES OF 1898—con.

Section 3052 - - - 337, 341
" 3065 - - - 337, 341
" 3068 - - - - 342
" 3069 - - - - 593
" 3069, subd. 8 - - 592
" 3070 - 34, 493, 502, 592
" 3071 - - - - 34
" 3075 - - - 64, 73
" 3076 - - - - 73
" 3205 - - - 611, 618
" 3241 - 442, 446, 447, 449
" 3274 - - - 588, 594
" 3285 - - - 588, 595
Sections 3314–3347a (ch. 143) 92, 97
Section 3314 - - 93, 94, 97, 134
" 3315 - - - 132, 134
" 3321 - - - - 97
Sections 3324, 3325 - - - 97
Section 3329 - - - 611, 613
" 3358 - - - 457, 460
" 3451 - - - - 355
" 3463 - - 442, 446, 452
" 3466 - 442, 448–451, 453
" 3478 - - - - 335
Sections 3480–3482 - - - 334
" 3487, 3488 - - - 334
Section 3489 - - - 331, 335
Sections 3498–3522 (ch. 151) 597, 666
" 3520, 3521 - - - 666
" 3810, 3811 - - - 626
Section 3813 - - - - 627
" 3940 - - - 71, 72
" 3964 - - - - 266
" 3982 - - - - 71
" 4231 - - - - 599
" 4253 - - - - 231
" 4255 - - 560, 565, 626
" 4256 - 560, 565, 625, 626
" 4281 - - - - 597
Sections 4607c, 4607d - 357, 361
Section 4971 - - - 442, 451
" 4973 - - - 300, 302

STOCK AND STOCKHOLDERS. See BUILDING AND LOAN ASSOCIATIONS, 1–5. CORPORATIONS, 13. PLEDGES.

STREET RAILWAYS.

See CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS, 2–4. PARTIES, 1. RAILROADS, 1, 2.

1. The rule as to whether a street railroad is an additional burden on the fee title to the street on which it is located, established in *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, applies to street railroads operated by electric power communicated by means of a

trolley wire supported over the track by cross wires attached to poles set in the streets near the outer edge of the sidewalk lines, so far as the construction and operation of such roads fall within the principle of such case. *La Crosse City R. Co. v. Higbee*, 389

2. The doctrine of *Krueger v. Wis. Tel. Co.* 106 Wis. 96, namely, that any new use of a street which to any extent requires a permanent occupancy thereof is an additional burden on the fee, applicable to telephone lines, does not apply to electric street railroads, because such railroads are but an improved method of using the street to effect its original design. The two doctrines divide on whether the use of the street is new, having regard to the original purpose thereof, or the use is only a new mode of devoting the street to public travel, its original purpose. *Ibid.*

3. The principle of *Hobart v. Milwaukee City R. Co.* may be stated as follows: A railroad constructed on the grade of a street and operated so as not to materially interfere with the common use thereof for public travel by ordinary modes, or with private rights of abutting landowners, and for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden on the fee thereof. *Ibid.*

4. A railroad satisfies the above essentials, regardless of the motive power used or how it is applied, if it be strictly a street railroad for the carriage of passengers on the street, taking them on and discharging them at reasonable points, and it be so constructed and operated as not to materially interfere with the ordinary modes of using the street for public travel or with private rights. *Ibid.*

5. A supporting trolley-wire pole, set in a street in front of the sidewalk, does not violate the above rule if it be placed with reasonable regard for the convenience of the owner of the fee of the land on which it is located, and so as not to materially interfere with access to his lot outside the street line. *Ibid.*

6. The owner of property abutting on a street in which it is proposed to construct a street railway under a franchise, conditioned that it should be accepted by the railway company, even though he might be entitled to enjoin the construction of the railway in front of his lot, cannot enjoin the company from accepting the franchise, and thus in effect annul the entire grant. *Linden Land Co. v. Milwaukee E. R. & L. Co.* 493

7. In such case the owner of property abutting on one street cannot enjoin the construction of such street railway on another, a mile and a half distant, and on which he owns no property. *Ibid.*

8. The laying and operation of an electric street railway for the carriage of passengers only, to be operated by the overhead system with trolley wires and supporting poles, under an ordinance permitting the same to be done, in the absence of a showing that it is proposed to locate poles or structures in such manner as to interfere with a property owner's right of access to his property, can be done without making compensation to the adjoining lot owners, and is not an additional burden to the fee. *La Crosse City R. Co. v. Higbee, ante*, p. 389, followed. *Ibid.*

STREETS AND SIDEWALKS. See CONSTITUTIONAL LAW. DAMAGES, 1, 6. EVIDENCE, 4. HIGHWAYS, 6. INSTRUCTIONS TO JURY, 2. MUNICIPAL CORPORATIONS. PARTIES, 1. STREET RAILWAYS.

SUBCONTRACTORS. See LIENS, 4, 5.

SUBSTITUTION of parties. See ACTION, 7.

SUPERIOR COURTS. See COURTS.
SUPREME COURT. See VILLAGES.
SURFACE WATER. See WATERS, 2, 3.

SURETYSHIP.

See GUARANTY. VENDOR AND PURCHASER, 1. VOLUNTARY ASSIGNMENT, 2–6.

In an action against the surety on the bond of a defaulting trustee, the evidence was *held* sufficient to establish a *devastavit* and demand and refusal to pay, conclusive upon the sureties on his bond, and sufficient to authorize suit thereon. *Richter v. Estate of Leiby,* 404

SURETYSHIP INSURANCE. See APPEAL, 1, 2.
SURRENDER of policy. See INSURANCE, 1, 2.
SURVEYS. See HIGHWAYS, 8.

TAXATION.

1. Sec. 1059, Stats. 1898, as amended by ch. 50, Laws of 1899, provides that real or personal property omitted from assessment in any of the three next previous years by mistake or inadvertence, unless previously reassessed for the same year or years, *shall be entered once additionally* for each previous year of such omission, giving the year of omission, and affixing a just valuation to each entry for a former year as the same should then have been assessed according to the best judgment of the assessor, and taxes shall be apportioned and collected on the tax roll for such entry. The statute originally applied solely to real estate and was extended by the amendment of 1899 to include personal property. *Held,* that the legislature did not intend to limit the effect of the amendment of 1899 to such personal property as remained unchanged in ownership or location, but intended thereby to include any and all personal property which by inadvertent omission escaped assessment, and that such intention is capable of enforcement as to any omitted property which, between the time of its omission and the time of reassessment, has passed out of existence, out of the ownership of the person assessed, or out of the assessment district. *State ex rel. Davis & Starr L. Co. v. Pors,* 420

2. The words "entered once additionally" in said sec. 1059, while used originally with reference to real estate, when applied by said amendment of 1899 to personal property, are *held* to apply to the purpose contemplated by the statute, rather than to the clerical method by which it is to be accomplished, and to be one of the steps leading to the ultimate result,—that the taxes shall be apportioned and collected on the tax roll for such entry. *Ibid.*

3. The general provision of sec. 1055, Stats. 1898, requiring property to be assessed from actual view, does not apply to an assessment of personal property omitted from a previous assessment, under sec. 1059 as amended, since the latter section provides that assessments made thereunder shall be according to the assessor's best judgment. *Ibid.*

4. Said sec. 1059, Stats. 1898, with its amendment including personal property, was intended to take immediate effect according to its terms, and regulated the conduct of assessors thereafter, without regard to whether the omissions to assess occurred before or after

the enactment of the amendment. Being purely a remedial statute, it was within the power of the legislature to give it such effect. *Ibid.*

5. Where in proceedings before a board of review, on objection to the assessment of plaintiff's personal property, no contention was made or evidence offered that the assessor's designation of it on the roll was not in accord with the facts, the board cannot ignore the assessor's report, and they commit no error in refraining from changing the assessment roll in that respect. *Ibid.*

6. MARSHALL and BARDEEN, JJ., dissenting, consider that the words of sec. 1059, Stats. 1898, as amended by ch. 50, Laws of 1899, in themselves, or as applied to the subject to which they refer, are not ambiguous; that taken in their literal sense they do not admit of any other meaning than that, when property is assessed in any year, it shall also be assessed once additionally for each of the three preceding years that it was by mistake or inadvertence omitted from the assessment roll; and that the use of the word "additional" in the law is an insurmountable barrier to reaching a conclusion that it was the legislative purpose to remedy mistakes in the omission of property from the assessment roll, if discovered within three years from the commission of the mistake, regardless of a change in the ownership of the property in the meantime, or the consumption or destruction of the property itself. *Ibid.*

7. Sec. 776, S. & B. Ann. Stats., provided that the electors at any annual town meeting should have power to raise money for town purposes, subject to the limitation as to the amount of highway taxes provided in sec. 1240. Ch. 293, Laws of 1895, amended sec. 776 by striking out the limitation referring to sec. 1240, and inserting a provision that the total tax levied for any one year should not exceed three per cent. of the assessed valuation of the taxable property of the town. Ch. 385, Laws of 1895, provided that the amount of highway taxes to be assessed in any town for any one year should remain as provided by said sec. 1240. *Held*, that the limitations of sec. 1240 remained unaffected by the change in sec. 776. *Mueller v. Town of Cavour*, 599

8. Under sec. 1240, Stats. 1898, a town containing less than 500 inhabitants has no power to levy or collect a highway tax of more than $1,000 in any one year, though such town contain two congressional townships; and warrants for work done on the highways, issued after that sum had been expended, are void. *Ibid.*

TAX TITLES. See MORTGAGES, 11. REFERENCE.

TELEGRAPH AND TELEPHONE. See STREET RAILWAYS, 2.

TENDER. See INTEREST, 5. TROVER AND CONVERSION, 3.

TOWNS. See HIGHWAYS, 9-15. INTEREST, 6. POOR LAWS. TAXATION, 7, 8.

TOWN ORDERS. See INTEREST, 6. TAXATION, 8.

TRESPASS.

1. In an action for unlawfully trespassing upon and entering the premises and dwelling house occupied by plaintiff, but which belonged to her husband, *held*, that plaintiff, being at the time in the exclusive possession of the dwelling house and premises as against the defendant, might recover such damages as she sustained by reason of such invasion of her possession and rights, even though the evidence was insufficient to show any direct assault upon the

plaintiff, or any attempt to have carnal intercourse with her. *Ford v. Schliessman,* 479

2. The plaintiff in such case is not entitled to recover any damages to the premises, that being a matter between the owner of the house and the defendant. *Ibid.*

TRIAL. See FRAUDULENT CONVEYANCES, 2. EVIDENCE, 3, 5. MUNICIPAL CORPORATIONS, 18. PLEADING, 1. PARTNERSHIP, 8.

TROVER AND CONVERSION.

See INTEREST, 1.

1. Plaintiff purchased a horse and buggy of L., who delivered the property at a certain livery stable. L. having absconded leaving her children, their uncle came to town to get what property she left and employed defendant to assist him. Defendant, who was undersheriff, having discovered the property at the stable, directed those in charge not to allow any one to remove it, and thereafter returned with the uncle and directed the property to be delivered to him, which was done. Defendant was ignorant of plaintiff's ownership and, when he did learn thereof, offered to return the property, which he did after suit had been commenced. *Held,* that defendant clearly exercised dominion over plaintiff's property in defiance of his rights, and was guilty of its conversion. *Cernahan v. Chrisler,* 645

2. In such case, the defendant being answerable not only for the value of the property, but for any special damages the plaintiff had sustained, the return to the plaintiff of the property and its acceptance, or its retaking, pending the suit goes only to mitigate the damages, and not in bar of the action. *Ibid.*

3. Where, in an action for conversion, the property is returned to and accepted by plaintiff pending the action, the defendant may protect himself against a judgment for the costs of the action, in case nominal damages only are finally recovered, by tendering judgment for nominal damages and costs up to the time of tender. *Ibid.*

TRUSTS AND TRUSTEES.

See EXECUTORS AND ADMINISTRATORS. FRAUD. GARNISHMENT, 2, 3. PARTIES, 2. PLEDGES, 1. SURETYSHIP. VOLUNTARY ASSIGNMENT, 7. WILLS, 4, 5.

Testator gave the income of his estate to his wife for life, the remainder in equal shares to his children H. and M. and a trustee for a third child C., in trust to pay the income to C., and if C. for seven years from and after testator's death, or at any one continuous period of time, led a moral and sober life, the trustee to convey C. his share. *Held* that, it being conceded C. had led a moral and sober life for a period of seven years, the trust was closed and his interest in the remainder became vested, irrespective of whether or not the testator's widow was living at that time. *Ordway v. Gardner,* 74

ULTRA VIRES. See BUILDING AND LOAN ASSOCIATIONS, 3.

UNDERTAKING. See APPEAL, 1, 2.

USURY. See INTEREST, 5.

VENDOR AND PURCHASER OF LAND.

See ACTION, 4. FRAUDULENT CONVEYANCES, 10, 11. GUARDIAN AND WARD.

1. J., having defaulted under a contract for the purchase from plaintiffs of certain lands, appealed from a judgment of foreclosure under that contract, S. signing the undertaking on appeal as surety. The judgment having been affirmed and an action brought on the undertaking, plaintiffs, J., and S. entered into a stipulation whereby in consideration of $325 then paid by J. and $12,000 to be paid by J.'s wife within thirty days, the said lands were to be conveyed to J.'s wife, the action dismissed, and the surety released. This stipulation was afterwards extended for sixty days by a writing providing, among other things, that the sum it was agreed J.'s wife should pay should draw interest. Neither writing was signed by J.'s wife or any one in her behalf. Except a small payment by J. no payment or tender was made within the time limit. *Held*, that both writings constituted options to buy at a given price, and not contracts for the sale of lands; that, the conditions prescribed not having been complied with, the right to pay and demand a deed did not survive the time limited: and that S.'s liability on his undertaking was not altered or destroyed by the negotiations between plaintiffs and J. *Nelson v. Stephens*, 136

2. The fact that plaintiffs, after the expiration of the option, agreed to accept a tender of the purchase money made by J., provided he also paid taxes levied on the land and the expenses incident to the option negotiations, cannot be considered as a recognition of the binding force of the original option after its expiration. *Ibid.*

3. In an action to recover earnest money paid on an oral agreement for the purchase of a hotel, owned by the vendor and vendee as tenants in common and operated by them in partnership, one of the important questions was whether the vendee (the plaintiff) was put into possession of the hotel pursuant to the alleged oral contract. There was evidence tending to show the affirmative of that proposition, and that the plaintiff had exercised exclusive control over the property. On cross-examination plaintiff, who had testified that he did not take possession thereof, was asked if, during such time, he did not assume to be the owner of the property and offer to sell it to K. An objection to such question as immaterial was sustained. *Held*, that the evidence was material, as tending to show whether the conduct of the plaintiff was consistent or inconsistent with his claim that no change in possession had taken place. *Cuddy v. Foreman*, 519

4. Such evidence was also admissible as original, independent evidence, because it bore upon the credibility of the plaintiff's testimony, because it tended to explain the purpose of the parties in respect to the acts on which the claim of change of possession in fact took place, and because the only objection made was that it was immaterial. *Ibid.*

5. Where the defense interposed in such case was that plaintiff was so put into possession as to take the oral sale out of the statute of frauds, it was error to exclude evidence tending to show that, while the alleged vendee was in exclusive possession, he conducted the business for his sole benefit and profit, such evidence being admissible as explaining the nature of the vendee's possession. *Ibid.*

6. In such a case evidence tending to show that a deed of the hotel from plaintiff to defendant, reciting a consideration of $2,500, was

executed and delivered in pursuance of a second oral contract, whereby, among other things, all existing claims, including that on which the action was brought, were mutually released, should have been admitted. It did not contradict the deed, which did not purport to evidence the entire contract, and was directed to the establishment of the entire contract. *Ibid.*

7. The fact that the wife of the vendee in an oral contract for the sale of land refused to sign a mortgage required to be given in order to enable him to carry out such contract, and that thereupon the vendor told him he might have time to carry out the deal, did not change the vendor's right to insist upon the contract being carried out as before, nor make the contract conditional. *Ibid.*

8. In an action to recover back earnest money paid on an oral contract for the conveyance of land, the question whether there was a change of possession of the property — thus taking the contract out of the statute of frauds — is for the jury, if there is credible evidence from which a finding in that regard could reasonably be made in the vendor's favor: it is not necessary that such change be established beyond dispute. *Ibid.*

9. The fact that the vendor in an oral contract to convey an interest in land is not the owner of the entire interest he contracts to convey does not affect the validity of the contract. If he puts the vendee into possession so as to take the contract out of the statute of frauds, he becomes liable to him in damages to the extent to which he is unable to perform his agreement. *Ibid.*

10. A memorandum, signed by both parties, reciting, among other things, that, in consideration of the purchase of certain real estate, sufficiently described, for a specified price, the seller agrees to sell a certain stock of merchandise and store furniture and fixtures at cost, less an agreed discount, payments to be made at agreed times, satisfies the statute of frauds (sec. 2304, Stats. 1898), since it does not require resort to parol evidence to ascertain the terms of the contract, and is plain, distinct, and definite as to parties, property, price, and terms of payment. *Van Doren v. Roepke,* 535

11. Under said sec. 2304 it is not necessary that the memorandum should contain apt and definite words expressing the agreement to convey: it is sufficient if, from a consideration of the whole contract, it can be gathered that it is the intention of one party to convey and of the other to purchase. *Ibid.*

VERDICT.

See APPEAL, 9, 13. DAMAGES, 4, 5. FRAUDULENT CONVEYANCES, 2, 7. HIGHWAYS, 15. INSTRUCTIONS TO JURY, 1. INSURANCE, 7. MASTER AND SERVANT, 3, 4. MUNICIPAL CORPORATIONS, 7, 9. RAILROADS, 7.

Where a special verdict is requested it is the duty of the trial court, under sec. 2858, Stats. 1898, to limit the questions to issuable facts, in contradistinction to mere evidence. *Sladky v. Marinette Lumber Co.* 250

VILLAGES.

See POOR LAWS.

An application to test the validity of the incorporation of a village, based on objections that the territory incorporated did not contain the requisite population per square mile, and that a majority of

the ballots cast by the electors was not in favor of the incorporation, does not state facts of such wide and public concern as to warrant the exercise of the original jurisdiction of the supreme court. *In re Town of Holland,* 178

VOLUNTARY ASSIGNMENT.

1. The duty of an assignee for the benefit of creditors is that of strict obedience to all orders of the court, and, in the absence of express direction, to exercise the utmost good faith and at least ordinary care and diligence. *Hill v. American Surety Co.* 19

2. Where it is a general custom for assignees for the benefit of creditors to keep the assigned property insured, failure of an assignee to use such diligence to procure insurance as would have been exercised by an ordinarily prudent and diligent man constitutes negligence, rendering both the assignee and the sureties upon his official bond liable for any damages proved to have resulted therefrom. *Ibid.*

3. In an action on the official bond of an assignee for the benefit of creditors, brought by a creditor to recover for loss occasioned by a failure to insure, evidence that the property was of a kind usually insured when in the hands of such assignees; that nothing in the assignment made insurance more improbable than usual; that the time to procure insurance was ample; that the value of the property justified insurance more than sufficient to have covered the creditor's claims; and that in all reasonable probability the efforts of an ordinarily diligent man would have been effectual to procure insurance exceeding such claims,—is *held* to establish plaintiff's case *prima facie,* and to cast upon the defendants the burden of showing that by due diligence the assignee could not have obtained either any insurance or enough to protect plaintiffs from the whole of their loss. *Ibid.*

4. In such a case hypothetical questions asked insurance agents such as "Had the assignee brought you the policies at any time before the fire to get your consent to the transfer to him of the insurance, would you have given it?" and "Would your company, at any time, have written insurance on property in the hands of an assignee?" merely call for the opinion of the witness as to what his conduct would have been under circumstances which did not exist, and were therefore improper. *Ibid.*

5. Where an assignee for the benefit of creditors had turned over the assigned property to a receiver, and had been *functus officio* for some years, and the result of the receiver's disposition of the property had been ascertained, a cause of action on the assignee's bond for negligence in the management of the assigned estate had become complete, and, under sec. 1695, Stats. 1898, could be enforced by creditors in an independent action on the bond; and the objection that there had been no formal settlement of the assignee's account, if such a settlement is a necessary preliminary step to such action, is a matter strictly in abatement, and is waived by an answer on the merits. [Whether, at every stage of the proceedings, individual creditors may maintain an action against an assignee for any act believed to be in derogation of his duty, although the same might properly become an item of charge in his general account, not determined.] *Ibid.*

6. The objection that there had been no formal settlement of the assignee's account is not raised by a demurrer on the grounds that

the complaint did not state facts sufficient to constitute a cause of action, and that plaintiff had an adequate remedy in the voluntary assignment proceedings. [Whether such objection can be raised at all by demurrer, not determined.] *Ibid.*

7. A debtor pledged practically all his property to an attorney as trustee for the debtor's wife to secure a debt substantially less than the value of such property. *Held*, that the transaction did not constitute an assignment for the benefit of creditors, since the pledgor still retained a valuable interest in the property, which was subject to execution under sec. 2988, Stats. 1898. *Haring v. Hamilton*, 112

8. A voluntary, common-law assignment for the benefit of creditors, good in the state where made, carries title to personal property wherever situated, but where the state steps in and regulates the distribution of the assigned estate in accordance with conditions which only the sovereign can prescribe, and the conditions so prescribed are such as to bring into play the essential features of a bankrupt law, the operation of the assignment will be limited to the state where made. *Segnitz v. Garden City Banking & Trust Co.* 171

9. Ch. 80*a*, S. & B. Ann. Stats., gives the assignment law the character of a bankrupt law, and a deed of assignment executed thereunder does not convey title to personal property in another state, at least as against creditors residing in such state. *Ibid.*

10. An Illinois corporation, being indebted to a bank in that state on promissory notes and having on deposit therein money subject to check, made an assignment for the benefit of creditors in this state. When the notes became due the bank applied the money on deposit to their payment and filed a claim in the assignment proceedings for the balance due on the notes. *Held*, that the filing of such claim was merely a recognition of the validity of the assignment so far as it conveyed property in this state, and did not estop the bank from denying its extraterritorial effect in an action to recover said deposit. *Ibid.*

11. In view of subd. 12, sec. 4971, and subd. 2, sec. 4972, S. & B. Ann. Stats., the provision of sec. 1702*d* that "any person" making a voluntary assignment for the benefit of creditors may be discharged from his debts in the assignment proceeding should be construed to include corporations. *Ibid.*

WAIVER.
Of conditions of contract. See GUARANTY, 1.
Of misjoinder of causes of action. See ACTION, 1. PARTNERSHIP, 3.
Of lack of jurisdiction. See LANDLORD AND TENANT, 6.
Of error by failure to except on former appeal. See APPEAL, 18.
Of objection to form of action. See ACTION, 9.
Of settlement of assignee's account. See VOLUNTARY ASSIGNMENT, 5.

WARRANTY. See INSURANCE, 3, 5 7, 8. INTEREST, 1. SALE OF CHATTELS.

WATERS.

1. Where a natural watercourse has run across a highway to and across plaintiff's land from time out of mind, the plaintiff's right to the natural flow of the water in the stream, as a natural incident to the right to the soil itself, is the same as he has to other natural advantages belonging to the land of which he is the owner, and injury and damage from a threatened diversion are presumed and need not be proved. *McEvoy v. Gallagher*, 331

2. In an action to restrain the obstructing or interfering with a ditch running across defendant's land, in and through which surface water from plaintiff's lots had been accustomed to flow for many years, and to compel the removal from such ditch of obstructions placed therein by defendant, the complaint is held to state a good cause of action. *Roberts v. Von Briesen*, 486

3. The owner of land may, by draining such land of surface and other water by an artificial way onto or through the land of another, openly, continuously, *adversely*, and with the consent of such other, for a period of twenty years, acquire an easement in the latter's land for a continuance of such drainage. *Ibid.*

WATERWORKS. See CORPORATIONS, 3.

WELLS. See LIENS, 4, 5.

WILLS.

See GARNISHMENT, 2. TRUSTS AND TRUSTEES.

Probate.

1. In a contest over the probate of a will giving a large share of the testator's property to his son R. and disinheriting J., evidence that the testator declared on many occasions that R. should have no more of his property, and that the testator was not able to understand enough English to comprehend the will in question, is *held* insufficient to show that he was defrauded by an attorney who drew the will, and supposed he was disinheriting R. and providing for J. *Roberts v. Roberts*, 213

2. Where the facts hardly allow belief in the good faith of the contestant of a will in appealing to the circuit court from the action of the county court in admitting the will to probate, it was not an abuse of discretion to award costs against the appellant. *Ibid.*

Construction.

3. A provision in a will, that real property be invested in a certain fund for the support and maintenance of a charity, is a direction to convert such property into money. *Hood v. Dorer*, 149

4. Testator, by his will, directed that upon the death of his wife his entire property be invested in a fund, provided for that purpose, for the benefit of the superannuated preachers of the church denominated the United Brethren in Christ. *Held*, that said clause is essentially a trust provision, applicable to a particular charitable purpose as distinguished from charity generally, with a class within which a trustee, when appointed, can select the beneficiaries, and is not too indefinite in its provisions to be enforced. *Harrington v. Pier*, 105 Wis. 485, followed. CASSODAY, C. J., dissents. *Ibid.*

5. Testator's widow, to whom a life estate in the entire property was given, in an action for the construction of the will named as defendants "the superannuated preachers of the church denominated the United Brethren in Christ." Such persons were not a body corporate, and there was no proof of service of the summons on any person who was a superannuated preacher. *Held*, that the judgment rendered in that action, in effect that the real estate in question descended as intestate property to the widow, was not *res adjudicata* as to those persons. *Ibid.*

WITNESSES. See EVIDENCE. MUNICIPAL CORPORATIONS, 18.

WORDS AND PHRASES.
Any person, in statute. See VOLUNTARY ASSIGNMENT, 11.
Corporate powers and privileges, in statute. See CONSTITUTIONAL LAW, 2.
Entered once additionally, in statute. See TAXATION, 2.
Franchise. See CORPORATIONS, 1–4.
Furtherance of justice. See PLEADING, 1.
Guardian of any ward, in statute. See ESTATES OF DECEDENTS, 1, 2.
Majority vote of county board, in statute. See COUNTIES.
Mortgage. See MORTGAGES, 8.
On or before, in promissory note. See BILLS AND NOTES, 2.
Ordinary case, in instruction to jury. See INSTRUCTIONS TO JURY, 6.
Person, in statute. See CORPORATIONS, 9.
Personal representatives, in statute. See EXECUTORS AND ADMINISTRATORS.
Precise danger, in instruction to jury. See MASTER AND SERVANT, 11, 12.
Quorum, in statute. See COUNTIES.
Void, in statute. See FRAUDULENT CONVEYANCES, 9.

WRIT.
Of attachment. See ATTACHMENT.
Of error. See EJECTMENT, 3, 4.
Of *mandamus*. See MANDAMUS.

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